Supreme Court, U.S.
FILED

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No.

In the

# Supreme Court of the United States

GARY L. WEBB and MELISSA L. WISNER,

*Petitioners,*

*v.*

BOARD of TRUSTESS of BALL STATE UNIVERSITY, et al.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. In Reviewing A Grant Of Summary Judgment, May A Court Of Appeals Satisfy Its Burden To Conduct A De Novo Review Of The "whole Record" Without Examining The Record?

2. Was It Error For The Court Of Appeals To Affirm A Summary Judgment Based On The District Court's Consideration Of Less Than The Entire Record, Where The District Court Erroneously Disregarded Some Evidence, And Struck Other Evidence, Submitted In Opposition To Summary Judgment?

3. In Their Suit Against State Officials Petitioners Were Prevented From Engaging In Discovery Under *Harlow V. Fitzgerald.* At The Conclusion Of The Preliminary Injunction Hearing The District Court Stayed The Proceedings While Petitioners Appealed From The Denial Of Preliminary Relief. After The Appeal, The District Court Denied Their Rule 56(F) Motion For Limited Discovery Regarding State Of Mind Issues On Grounds, Inter Alia, That Petitioners Should Have Engaged In Discovery Before The Appeal. The District Court Then Granted Summary Judgment In Part On Grounds That Petitioners Failed To Present Evidence Of Retaliatory Or Conspiratorial Motive, Of Discriminatory Intent.

4. Under These Circumstances, Is The Court Of Appeals' Order Affirming The District Court'S Denial Of Discovery And Its Grant Of Summary Judgment So Far A Departure From The Accepted And Usual Course Of Judicial Proceedings, And A Sanction Of Such A Departure By The District Court, As To Call For The Exercise Of This Court's Supervisory Power?

## PARTIES TO THE PROCEEDINGS

### Plaintiffs

The plaintiffs are Gary L. Webb and Melissa L. Wisner. Former plaintiff, Susan L. Sayles, entered into a settlement with certain defendants and is no longer a party.

### Defendants

The defendants, who were sued individually and in their official capacities, are Board of Trustees of Ball State University in Muncie, Indiana, and its individual members, namely, Frank A. Bracken, Chad A. Davis, Jeffrey Smulyan, Krishna A. Thomas, Thomas L. Dewees, Hollis E. Hughes, Jr., Richard L. Moake, James W. Parks, and Gregory A. Schenkel.

The following additional respondents are present or former university administrators, employees, or agents of Ball State University: John Worthen, Warren Vander Hill, Ronald Johnstone, Donald Van Meter, Jon Moll, Chris Airries, Tom Lowe, Ramon A. Avila, Carla Earhart, Robert Hayes, Ann Henderson, Kyama Kabadaki, Tim Lyon, Donald Merten, Leslie Milner, Jerome Ulman, Arthur Wilson, Judy Yardon, Sali Falling, Paul Parkison, Kaye E. Hodson, Sue H. Whittaker, R. Thomas Wright, James Hendricks, Jean Comley, Bryan Byers, Taiping Ho, Michael P. Brown, Norman Beck, Joseph Wehner, and Terrance Aldridge.

Any defendants below not named hereinabove who were named in the original complaint were dismissed in connection with the aforementioned settlement with former plaintiff Susan L.Sayles, or for other reasons, were deceased before the date of filing of this petition.

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## OPINIONS BELOW

Petitioners seek review of the unpublished judgment of the Court of Appeals for the Seventh Circuit in this matter ("*Webb II*") dated October 25, 2000, found at 2000 U.S. App. LEXIS 27399. It is reproduced in the Appendix at 1a-3a.

The latter decision affirmed the district court's unpublished January 5, 2000, Entry Regarding Pending Motions (R. 152), granting respondents' dispositive motions. It is reproduced in the Appendix at 4a-100a.

The third opinion is an order entitled Entry on Motion to Lift Stay and for Other Relief (R. 149), dated August 19, 1999, which is relevant to this petition. It is reproduced in the Appendix at 101a-109a.

The fourth opinion ("*Webb I*") is the earlier affirmance of the district court's denial of preliminary injunctive relief, and is reported in It is reproduced in the Appendix at 110a-117a.

## BASIS OF JURISDICTION

1. Date of judgment sought to be reviewed: October 25, 2000, Order of Court of Appeals for the Seventh Circuit.
2. Date of any Rehearing: None.
3. Cross-petition under Rule 12.5: Not applicable.
4. Statutory basis for the Court's jurisdiction: 28 U.S.C. § 1254(1).
5. Notice required under Rule 29.4(b): Not applicable.

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

### Constitutional Provisions

**Constitution of the United States, Amend. I.**

**Constitution of the United States, Amend. VII**

**Constitution of the United States, Amend. XIV, § 1**

**Statutes**

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**42 U.S.C. § 2000e2(a)(1)**

**42 U.S.C. § 2000e-3(a)**

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**Fed. R. Civ. P. 83(a)(2)**

**Local Rule 56.1, S.D. Ind. (1998)**

(See App. pp.118a-23a)

## STATEMENT OF THE CASE

**Petitioners' Complaint.** Petitioner Gary L. Webb is a tenured, associate professor of criminal justice and former chairperson of the Ball State University's (Muncie, Indiana)

Department of Criminal Justice & Criminology. Co-Petitioner Melissa Wisner is the former administrative coordinator of that department, and previously reported to Webb. In August, 1997, petitioners invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1343(3) and commenced an action (R. 1)[1] against the respondents herein in the U.S. District Court for the Southern District of Indiana under 42 U.S.C. § 1983 and Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e-2(a)(1) and 2000e-3(a).

The gist of petitioner Webb's complaint in Counts I through IV is that respondents had, *inter alia*, retaliated against him (a) for reporting sexual harassment complaints to respondent university administrators that were brought to him by two students, a female faculty member (former plaintiff Susan Sayles) and co-petitioner Melissa Wisner, against certain faculty members in his department, (b) for complaining to the respondent university Board of Trustees that the university administrators to whom he had passed on these complaints had unduly delayed remedial actions and (c) for complaining of acts of favoritism in violation state law, university regulations, and departmental policies by those same administrators toward the subjects of the sexual harassment complaints. The retaliation alleged took various forms and was carried out, *inter alia*, (1) by the Board of trustees and the university president (Worthen) in establishing an ad hoc committee ostensibly to investigate his claim of retaliation, but which was ultimately charged with investigating him (R. 1, at 11); (2) by the university administrators' of whom he had complained in their giving him an unjustifiably low pay raise (R. 1, at 11), interfering with his official duties (R. 1, at 13, 15), removing him from his position as chairperson of the department and appointing

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[1]References are to the numbers assigned to filings by the clerk of the district court. Transcript page references are to the 6-day hearing conducted on petitioner's motion for preliminary injunction conducted between December 30, 1997, and January 7, 1998.

one of the subjects of the sexual harassment complaints in his stead (R. 1, at 13-14), and using the university's Affirmative Action Office and university committees as a means of retaliation against those critical of them (R. 1, at 16-17), and (3) by the subjects of the harassment complaints themselves in taking other acts against him and his supporters (R. 1, at 17) that resulted in monetary damages and other deprivations.

Petitioner Wisner alleged in Counts IX through XII of the complaint that she was a victim of sexual and non-sexual harassment by certain faculty respondents, and that she was also retaliated against for opposing such conduct in the department. She complained, *inter alia*, of retaliation by the subjects of her sexual discrimination and sexual harassment complaints in the form of false allegations of poor work performance, false counter-complaints against her, a finding of guilt of unspecified charges(R. 1, at 27-29), and by her forced lateral transfer to a significantly lesser position with reduced responsibilities by certain respondents about whom Webb and she had complained (R. 1, at 28).

**Procedural History before *Webb I.*** Respondents filed a series of lengthy motions to dismiss the complaint and for partial summary judgment with supporting memoranda and appendices on October 15 (R. 56, 59, 61, 62, 63, 64) and October 29, 1997 (R. 72, 73, 74, 75). Retaliatory action against them having continued, after filing of their complaint, on December 12, 1997, petitioners sought preliminary injunctive relief (R. 80). Petitioners presented their evidence at a hearing conducted between December 12, 1997 and January 7, 1998.

Because they were suing state university officials, and because the district court had not yet ruled on the respondents' defense of qualified immunity which respondents had raised in their motions to dismiss, petitioners were unable to undertake any discovery. *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L. Ed. 2d 396, 102 S. Ct. 2727

(1982).[2] On December 29, 1997 and January 21 and 22, 1998 petitioners filed with leave of court their papers opposing respondents' dispositive motions (R. 87, 105, 107).

On February 5, 1998, petitioners filed their notice of appeal from th edenial of their motion for a preliminary injunction(R. 122). On February 11, 1998, the district court stayed its proceedings pending petitioners' appeal of the court's denial of their motion for preliminary injunction (R. 128):

> This means that rulings will not be issued on the pending dispositive motions or on the pending motion to disqualify counsel until after a ruling is issued on the appeal of the denial (in part) of the preliminary injunction. Similarly, there is a STAY of all discovery and pleading in this court (except pleadings seeking a dissolution of the stay) (R. 128, at 1)

While the appeal was pending, the district court granted petitioners' motion to supplement the record on appeal by way of evidence of continuing retaliation against them (R. 134).[3]

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[2]In contrast, one day before the injunction hearing respondents were granted "expedited discovery" of certain tape recordings petitioner Webb had made of telephone calls he received from certain respondents, and which respondents anticipated would be used by petitioners at the preliminary injunction hearing (R. 126).

[3]Petitioner Webb supplemented the record (R. 132, 133) with evidence that respondent Hendricks had again, after the injunction hearing, assigned him courses outside his area of specialization without any justification (and with no pretext), in violation with university and departmental policies, the department placed an advertisement to hire someone else to teach courses in Webb's areas of specialization, respondents Brown and Hendricks had, as a 2-person committee, given him an unjustifiably low performance evaluation that resulted in his failing to receive and merit raise or even an across-the-board raise given

***Webb I.*** The court of appeals thereafter affirmed the district court's denial of a preliminary injunction. *Webb v. Bd. of Trustees of Ball State University*, 167 F.3d 1146, 1149 (7th Cir. 1999) ("*Webb I*") (App. 110a-117a) concluding that the district court had not abused its discretion in denying the injunctive relief sought and had not made clearly erroneous (oral) findings of fact or conclusions of law, the court of appeals stated, "We do not rule out the possibility that on a more complete record plaintiffs may be able to show that scholarship and teaching proceeded at a normal pace while the intramural dispute festered, but as things stand the denial of injunctive relief must be AFFIRMED." 167 F. 3d at 1151.

**Post-*Webb* I Proceedings.** On August 12, 1999, petitioners moved (a) to lift the stay previously imposed, (b) to permit further amendment of their previously-filed statements of genuine issues of fact to include page references to the preliminary hearing transcript that had not yet been prepared when those statements of genuine issues were submitted, (c) to permit further supplementation of the record with (i) additional information evidencing continuing acts of retaliation and damages and (ii) information regarding state of mind and workplace disruption issues through affidavits or depositions to be taken, and (d) for an order under Rule 56(f) to continue the ruling on the pending dispositive motions until the petitioners had the benefit of some limited discovery sais issues which were relevant both to the issue of qualified immunity and petitioners' substantive

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to all other faculty, which directly benefitted respondents in his department financially, and formulating new standards for eligibility to teach correspondence courses, which made him also ineligible for the financial benefits of teaching such courses to supplement his income, and the fact that respondent Hendricks, after assigning him to teach a course outside his area of specialization contrary to university custom, now had placed Webb's personnel file disparaging remarks about his teaching performance in that a class.

claims..[4]

Their motion while not supported by affidavits, recited the fact that the district court itself had found that petitioners had, in reporting sexual harassment, engaged in protected speech (Tr. 284), that petitioners had submitted supplemental evidence of retaliation during the pendency of the *Webb I* appeal, and that "defendants have again, since the decision of the Court of Appeals, further retaliated against Webb by first assigning him four courses to teach during the 1999 summer semester, and then suddenly removing him from those teaching assignments for no stated reason" (R. 147, at 2). Petitioners further stated that they "have no access to statements of the defendants or witnesses under their employ; they have no way of obtaining documentary evidence establishing retaliatory and conspiratorial intent" (R. 147, at 8); that they, "absent an opportunity to conduct limited discovery, are also unable to respond to defendants' claims that no civil conspiracy existed. They are entitled to discover evidence of meetings, minutes of meetings,

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[4]Petitioners, in support of their motion for limited discovery on state of mind issues, cited to cases holding that, where intent is an element of the alleged constitutional offense, a plaintiff must be allowed an opportunity to offer proof of defendant's illicit motive on the question of whether the alleged conduct establishes a constitutional violation: *Wade v. Hegner*, 804 F. 2d 67 (7th Cir. 1986); *Polenz v. Parrott*, 883 F.2d 551 (7th Cir. 1989); *Martin v. D.C. Mtro. Police Dept.*, 812 F. 2d 1424, vacated in part, 817 F. 2d 144, original opinion reinstated, 824 F. 2d 1240 (D.C. Cir. 1987). Petitioners also cited to commentary: "The purpose of subdivision (f) [of Rule 56] is to provide an additional safeguard against the improvident or premature grant of summary judgment and the rule has generally been applied to achieve that objective. Consistent with this purpose, courts have stated that technical rulings have no place under the subdivision and that it should be applied with a spirit of liberality. Thus in certain circumstances courts have indicated that continuance would be proper even though Rule 56(f) had not been formally complied with when the court concluded that the party opposing summary judgment had been diligent and had acted in good faith." (Footnotes omitted) Wright, Miller & Kane, Federal Practice and Procedure § 2740.

memoranda, etc., all of which may raise genuine issues of fact regarding defendants' conspiratorial intent." (R. 147, at 5-6).

On August 19, 1999, the district court denied petitioners' request for limited discovery (R. 149, at 7, 9) on grounds that they (a) "have not complied with Fed. R. Civ. P. 56(f)," (b) had failed to indicate why their evidence in the injunction hearing would be insufficient to support their conspiracy claims, and because (c) "they have failed to demonstrate why they could not have discovered such evidence as they now seek in the months the suit was pending prior to the conclusion of the briefing on the pending motions." (R. 149, at 9-10). The court also denied petitioners' request to supplement the record with additional affidavits and materials establishing continuing retaliation (R. 149, at 6-7). It did, however, grant petitioners' motion to submit a Third Amended Statement of Genuine Issues that cited to the injunction hearing transcript, but stated they were not allowed "to redo or correct any of the prior submissions" (R. 149, at 3). Almost five months later, on January 5, 2000, the district court in an 87-page opinion (App. 4a-100a) found that there were no genuine issues of material fact and granted respondents' motions for summary judgment.

***Webb II.*** Petitioners on appeal in *Webb II* argued that under well-established law the court of appeals' earlier decision concerning the injunction did not trigger law of the case consequences, and could not be used to dispose of an action on the merits by means of summary judgment (App. Br. at 13).[5] They also noted the district court's inexplicable

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[5]Petitioners cited *University of Texas v. Camenisch, 451 U.S. 390, 395 (1981); Bd. of Trade of the City of Chicago v. Commodity Futures Trading Comm'n*, 605 F.2d 1016, 1020 (7th Cir. 1979), *cert. denied*, 446 U.S. 928; *Technical Publishing Co. v. Lebhar-Friedman, Inc.*, 729 F. 2d 1136, 1139 (7th Cir. 1984); *Wilcox v. United States*, 888 F. 2d 1111 (6th Cir. 1989); and Wright, Miller, and Kane, 18 Fed. Pract. & Proc. Juris § 4478 (1999), in support of this proposition.

failure in its judgment to cite to *any* specific witnesses testimony from the six-day injunction hearing, nor most of the 13-page affidavit Webb filed on January 19, 1998. (App. Br. at 13-14).[6] Petitioners raised two issues in the court of appeals in *Webb II*: (1) "May the district court in a civil rights and Title VII action against state officials bar plaintiffs from engaging in discovery, and then grant defendants' motion for summary judgment?," and (2) "Were there genuine issues of material fact regarding defendants' state of mind, credibility, and workplace disruption that precluded summary judgment?" (Appellants' Brief at 12). On October 25, 2000, the court of appeals, in an unpublished 3-paragraph order (App. 1a-3a), affirmed (without oral argument) the district court's grant of summary judgment. It held, *inter alia*, that, "The nature of this case is discussed in our prior opinion, 167 F. 3d 1146 (7th Cir. 1999), and the ensuing 87-page opinion by the district court. It is unnecessary to elaborate on the claims and suffices to say that we believe the district court's handling of them correct." Documents in the record establish that the court of appeals in fact did not examine the record in the *Webb II* appeal.[7] The court of appeals also held that the district court did not abuse its discretion in denying petitioner's Rule 56(f) motion for limited discovery, and stated that, "The district court was entitled to bring this litigation to a conclusion." (App. 3a).

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[6]Unlike other affidavits petitioners filed in opposition to respondents' dispositive motions which respondents moved to strike (R. 94), no motion to strike was filed against this affidavit.

[7]A letter transmitting the mandate from the clerk of the court of appeals to the clerk of the district court in the record dated November 16, 2000, has an "X" inserted next to the statement, "No record filed." In addition, the district court's docket sheet for this case contains the notation, "There was no record sent to C/A in this case." (R. 175).

## REASONS FOR GRANTING THE WRIT OF CERTIORARI

**WHERE BOTH THE DISTRICT COURT AND THE COURT OF APPEALS FAILED TO CONSIDER THE WHOLE RECORD IN GRANTING AND AFFIRMING, RESPECTIVELY, SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS, THE RULINGS CONFLICT WITH RELEVANT SUPREME COURT PRECEDENTS, DENY PETITIONERS' RIGHT TO TRIAL BY JURY, AND REQUIRE THAT THIS COURT EXERCISE ITS SUPERVISORY POWER.**

### I. The court of appeals did not satisfy its obligation to conduct a de novo review of the whole record when it merely cited to its prior opinion, stated its agreement with the district court's judgment, and did not examine the record to determine the appropriateness of the grant of summary judgment.

It is axiomatic that under Rule 56, the court must review the record "taken as a whole." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp*, 475 U.S. 574, 587 (1986). In the First Amendment context, in cases involving public employees like this one, "whether an employee's speech addresses a mater of public concern must be determined by the content, form, and context of a given statement *as revealed by the whole record.*" (emphasis added) *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). The standard for granting summary judgment "mirrors" the standard for judgment as a matter of law; under each the inquiry is the same. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986). This Court has recently held that, "in entertaining a motion for judgment as a matter of law, the court should review *all of the evidence in the record.*"

*Reeves v. Sanderson Plumbing Products, Inc*, 530 U.S. ____ (Slip opinion at 15) (2000).

In this case, the court of appeals' opinion of October 25, 2000, on which petitioners' seek a writ of certiorari, is a three-paragraph order affirming an 87-page district court opinion that had addressed many of the 38 issues raised by the 50 defendants in their dispositive motions. (R. 59, 61, 74). The district court had before it a record that included (1) a three-volume appendix of materials in support of respondents' dispositive motions, including 14 affidavits (R. 63, 64, 75), (2) seven counter-affidavits of petitioners (R. 80, 87) (one of which--Webb's 13-page affidavit of January 19, 1998 [R. 108]--the district court made only passing reference to in its opinion granting summary judgment), (3) a six-volume transcript from the injunction hearing, (4) a six-volume set of petitioner's exhibits, only a few of which were found to be inadmissible (Tr. 1333-1334), and (5) a set of unbound exhibits introduced at the injunction hearing. No discovery, however, was ever conducted under the rule announced in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Despite the size of the record and the complexity of the case, the court of appeals' 3-paragraph order affirming summary judgment does not even include the words "summary judgment." The order merely cites to that court's prior opinion in *Webb I* (affirming the denial of injunctive relief) for a description of the facts of the case, and then summarily affirms the district court.

The court of appeals' failure to conduct a *de novo* review to request the record for examination, and its wholesale adoption of the district court's judgment without consideration of any of the issues raised by petitioners in their brief on appeal except the Rule 56(f) issue[8] constitutes a

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[8]Petitioners' appellants' brief raised two primary issues: (1) that the district court abused its discretion in denying petitioners' Rule 56(f) motion to continue the summary judgment proceedings and allow limited discovery under *Crawford-El v. Britton*, 523 U.S. 574 (1998) (acknowledging there may be instances where improper motive may be

failure to address the issue of summary judgment. This Court has frequently granted certiorari when courts of appeal have failed to address issues. *See New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979); *Clay v. Sun Insurance Office, Ltd.*, 363 U.S. 207 (1960); *Bank of America National Trust and Savings Ass'n v.* Parnell, 352 U.S. 29 (1956); *Alma Motor Co. v. Timken-Detroit Axle Co.*, 329 U.S. 129, (1946). Failure to address the issue of summary judgment is as significant as a court of appeals' failure to address an issue of statutory construction, as occurred in the latter cases, warranting the issuance of the write of certiorari.

This Court is not being asked to deviate from its usual rule of non-interference where conclusions of the Circuit Courts of Appeals depend on an appreciation of circumstances which admit of different interpretations. *Federal Trade Commission v. American Tobacco Co.*, 274 U.S. 543 (1927). That the concurrent findings of two lower courts are persuasive proof in support of their judgments is a rule of wisdom in judicial administration previously announced by this Court. *Baumgartner v. United States*, 322 U.S. 665 (1944). In the administrative context, this Court has held that it will follow the same rule of non-interference with a decision of a court of appeals on the question of the substantiality of evidence before a hearing officer, so long as the court of appeals "painstakingly reviewed" and made a "fair assessment" of the record. *National Labor Relations*

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an essential component of a plaintiff's affirmative case, and that discovery may therefore be necessary before the district court can resolve a motion for summary judgment based on qualified immunity), and (2) that summary judgment on this record was inappropriate because the case fits almost every category of case in which summary judgment is inappropriate. Several, subsidiary issues were also raised, including the claim that the court erred in striking hearsay statements in petitioners' affidavits where they were admissible on other grounds, and reference was made to specific questions of fact relating to the issues surrounding the court's dismissal of the EEOC claims, the due process claims, and claims against respondent Aldridge.

*Board v. Pittsburgh S. S. Co.*, 340 U.S. 498, 502 (1951).

This Court has, however, held that the 2-court rule of non-interference does not preclude some consideration of the nature of the underlying facts. *United States v Winstar Corp.*, 518 U.S. 839 (1996). In *The "City of Hartford" and the "Unit,"* 97 U.S. 323 (1877), this Court stated that,

> [I]t is a mistake to suppose that this court will not re-examine the whole testimony in the case, as the express requirement of the Act of Congress is that the Supreme Court shall hear and determine such appeals, and it is as much the duty of the court to reverse the decree from which the appeal is taken for error of fact, if clearly established, as for error of law.

The Supreme Court is not a court for correction of errors in fact finding, "in the absence of a very obvious and exceptional showing of error." *Graver Tank Co. v. Linde Co.*, 336 U.S. 271, 275 (1949) In the case of important rights such as citizenship, where deportation is threatened, this Court stated that the 2-court rule,

> does not relieve us of the task of examining the foundation for findings in a particular case. . . We cannot escape the conviction that the case made out by the Government lacks that solidity of proof which leaves no troubling doubt in deciding a question of such gravity as is implied in an attempt to reduce a person to the status of an alien from that of citizen.

*Baumgartner v. United States*, 322 U.S. 655 (1944). Likewise, the right to trial by jury as guaranteed by the Seventh Amendment is as weighty as citizenship. And if the practice of the court of appeals below in not reviewing a record *de novo* in appeals from summary judgment is allowed

to continue unchecked, the general public's right of trial by jury is seriously threatened.

The petitioners' request herein that this Court grant a Writ of Certiorari and vacate and remand because the court of appeals in fact conducted no review of a record in deciding an appeal from a grant of summary judgment is a question of general importance not contingent upon resolving conflicting testimony, and not only important to the parties hereto. The general rule of non-interference in cases admitting of varying interpretations of fact in which the record has been reviewed by two courts is inapplicable, therefore, where the record undisputably shows, as it does in this case, that the court of appeals below failed to make *any* assessment of the record, much less a "fair assessment." And, significantly, perhaps ironically, this omission by the court of appeals occurs in a case requiring a heightened level of scrutiny because it arises in of the employment context. This case falls squarely within the narrow exception to the 2-court rule for very obvious and exceptional errors described in *Graver Tank*, *supra*.

The court of appeals' reliance on the facts stated in *Webb I* conflicts with this Court's and the Seventh Circuit's prior precedents holding that findings of fact at a preliminary injunction hearing are not binding at a trial on the merits, *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981), and may not be used to dispose of an action on the merits by means of summary judgment because they rest on nothing more than a tentative appraisal of the probable result on the merits. *Technical Publishing Co. v. Lehbar-Friedman, Inc.*, 729 F. 2d 1136, 1139 (7th Cir. 1984); *Board of Trade of the City of Chicago v. Commodity Futures Comm'n*, 605 F. 2d 1016, 1020 (7th Cir. 1979); *Wilcox v. United States*, 888 F. 2d 1111 (6th Cir. 1989). In appeals from denials of injunctions, the appellate court reviews evidence, not affidavits submitted by the summary judgment movant and nonmovant. Moreover, at the time of the appeal in *Webb I* the petitioners Third Amended Statement of Genuine Issues (R. 150) on which the district court based its decision granting summary

judgment, had not even been filed. The short, 3-paragraph affirmance by the court of appeals of a case involving numerous defendants, and complex facts, claims, and defenses, on its face makes the order a mere "judicial echo" of the district court. *See National Labor relations Board v. Pittsburgh S. S. Co.*, 340 U.S. 498, 501 (1951), where in a case involving a second appeal this Court stated that it

> must take care that the court [of appeals] has not been influenced by that feeling [i.e., by its first appeal decision that a hearing officer was biased], however unconsciously, on reconsidering the record now legally freed from such imputation. Consideration of the opinion below in light of a careful reading of the entire record convinces us that the momentum of its prior decision did not enter into the decision now under review . . . The court painstakingly reviewed the record [. . .]

Here , the court of appeals specifically adopted *in toto* the district court's summary judgment based on its own view of the facts as stated in its prior opinion in *Webb I*. Without a review of the entire record (that could have given due consideration to the evidence adduced at the injunction hearing and other materials), neither a "painstaking" nor a "fair assessment" of the entire record was conducted, leaving no doubt that the court of appeals was not freed from the momentum of its prior decision. *Cf. Harris v. Pate*, 440 F. 2d 315 (7th Cir. 1971) (right to respond to a summary judgment motion cannot be denied because the trial judge believes that plaintiff's claim is insubstantial or frivolous). The final sentence in the short order of the court of appeals' decision, stating its view that "The district court was entitled to bring this litigation to a conclusion," evidences the fact that it was not freed from its view of the case revealed in its prior decision in *Webb I* finding merit in the district court's

interpretation of the facts as a mere "faculty feud" that should not take up the time of a busy federal bench, thus denying petitioners' right to trial by jury.

## II The court of appeal's decision is in conflict with decisions of this Court, and sanctioned a departure from the accepted and usual course of judicial proceedings so that the exercise of this Court's supervisory authority is required to protect petitioners' rights under Rules 56 and 83(a)(2), and their Seventh Amendment right to trial by jury.

### A. The district court disregarded established principles for denial of summary judgment

**Function of the Court.** This Court's prior decisions make clear that, in both the consideration of a motion for summary judgment and a subsequent review of a grant thereof, the function of courts is not to weigh the evidence and determine the truth of the matter but, rather, to determine whether there is a genuine issue for trial. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968)."The inquiry performed is the threshold inquiry of determining whether there is the need for trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).[9] The court "must

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[9]In *Anderson*, the Court noted that it was not addressing the question of the initial burden of production of evidence on the party moving for summary judgment, and was assuming for purposes of its discussion that the moving party has met initially the requisite evidentiary burden. 477 U.S. at 250, n. 4. In contrast, petitioners did make such an argument in their brief in *Webb II*, i.e., that "the defendants' own papers establish a multitude of issues of disputed fact. The memoranda of the

draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554-555 (1990). "[A]lthough the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. ___, 120 S. Ct. 2097, 2110 (2000).

The district court gave credence to the respondents' claim that their removal of petitioner Webb from his position as chair of the department was done because it was perceived that his department was in chaos and for his disregarding the dean's instruction. (App. 70a). In contrast, petitioner's evidence at the injunction hearing showed that a group of junior faculty, led by a tenured professor who was a subject of sexual discrimination complaints and had a checkered past in the department (Tr. 709) (respondent Hendricks), had engaged in a series of adverse administrative employment actions against the petitioners that caused them financial and emotional harm. (e.g., Tr. 719, 722, 726-727, 740-741, 746, 754, 758. 787, 980-981, 991, 993). The dean (respondent Johnstone), himself a subject of Webb's complaints about the administration sitting on its hands in the face of student sexual harassment complaints, joined the attack on Webb by interfering with his administrative duties by, *inter alia*, forcing him to change previously approved and published course schedules to accommodate respondent faculty Hendricks and Byers. (Tr. 956-957, 963-978, 1107).

This and other acts of favoritism shown to those about

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parties to and from each other reflect the numerous conflicts between the parties' versions of the truth of the contents of the memoranda, grievances, charges, and counter-charges. How do these materials establish an *absence* of disputed issues of fact? If the movant's papers are insufficient themselves or on their face reveal a genuine issue of material fact, summary judgment is inappropriate," citing *Wang v. Lake Maxinhall Estates, Inc.*, 531 F. 2d 832, 835 n. 10 (7th Cir. 1976).

whom Webb had complained were dismissed by the district court because in its view the acts taken against Webb were not supported by an analysis of the temporal nexus between the adverse actions and Webb's protected speech, that respondents had shown a legitimate, non-discriminatory reason for them, and that Webb had not come forward with specific evidence to establish his claim of pretext. (App. 70a). The court reached the same decision regarding petitioner Wisner's claim that her lateral transfer was done to retaliate against her for supporting Webb's efforts to protect students, female faculty, and herself in the department from faculty engaging in sexual harassment, and in retaliation for her own filing of sex discrimination and sexual harassment claims against certain faculty. The court gave credence to respondents' purported legitimate, non-discriminatory reason for the transfer, to the effect that the transfer was for her own good because it would avoid potential problems in the future with respondent Hendricks, who was placed in Webb's position after he was removed as chair and because he had been a subject of one of her sexual harassment complaints. (App. at 82a). The record included the testimony of former defendant Wynola Richards, a university vice-president , who testified that respondent Norm beck, who had asserted in an affidavit and at the hearing that Wisner was transferred for her own good to avoid problems between her and Hendricks, had a reputation for truthfulness that was "not high" (Tr. 859), supporting Wisner's testimony that Beck told her the transfer was engineered by respondent Hendricks. (Tr. 1147). As with Webb, the district court, which had denied petitioners' any discovery on state of mind issues, held that she had not "come forward with anything to establish that the proffered reason had no basis in fact" and that the evidence establishes that the proffered reasons given by respondents "have a substantial factual basis. (App. at 83a). In *Reeves*, this Court held that evidence of discriminatory intent was shown where the employer gives false explanations for his or her actions. In this case, we have the same situation, plus *no*

explanations were proffered for many of the other acts taken against petitioners, the most obvious of which is respondent Hendricks' repeated breach of Webb's entitlement to teach courses within his area of specialization.

The district court trivialized Webb's claim of suffering from adverse employment action, by describing the acts taken against him as "minor and even trivial" actions, and failed to discuss the several years of placement of disparaging and false references about him in his personnel file by various respondents, their giving him unjustifiably low performance evaluations and raises, refusing to assign him courses in his areas of specialization as required by university and departmental custom (see, e.g., Tr. 244-246, 314, 318-319, 328-329, 336-341, 352, 366, 370, 374-375, 381-383, 385-386, 399, 403-404) which caused him to spend his free time–normally used for research or consulting–for new course preparation, refusal to assign him correspondence course and summer teaching assignments (which had a seriously adverse financial effect upon him), as well as other actions such as unjustified parking tickets. (The latter was one of the court's two examples of actions that it found "minor and even trivial," and the second being the series of anonymous letters sent to local newspapers that had falsely accused him of a sex-for-grades scandal, one of the envelopes for which he identified at the injunction hearing as having an address written in respondent Hendricks' handwriting). (Tr.989).

This evidence in the record establishes that the district court, having denied petitioners' request for discovery, weighed the respondents' evidence and made credibility determinations that their explanations were more believable than the petitioners', contrary to the aforementioned principles of summary adjudication. It and the court of appeals, in conflict with Supreme Court precedent, decided the facts of this case, rather than allowing a jury to do so.

**Complexity of the Case.** The complexity of a case itself may result in a denial of a motion for summary

judgment. *Askew v. Hargrave*, 401 U.S. 476 (1971). 10 Wright, Miller & Kane, *supra*, § 2732, at 174. Courts should be cautious in granting summary judgment in cases presenting complex issues of law or fact. *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948); *Petition of Bloomfield S. S. Co.*, 298 F. Supp. 1239 (S.D.N.Y. 1969), *aff'd*, 422 F. 2d 728 (2d Cir. 1970). The district court heard six days of testimony on petitioner's request for preliminary relief. Approximately 400 documents were received into evidence from petitioners and respondents. Twenty-one affidavits were offered in support and in opposition to the motions for summary judgment. But the essential facts are not in dispute. As respondents stated in one of their pleadings, "The historical facts about what Plaintiffs did or said, to whom, under what circumstances and so forth are not in dispute." (R. 91, at 4). The complecity of the case lies not only in the breadth of the evidence, but in the states of mind of the respondaents. Respondents' interpretation of the facts, accepted without question, is that the dispute between the parties is merely a "raging faculty feud," and that petitioners' conduct in defending against acts taken against them was disruptive and lost its constitutional protection because it hurts the students' education. (Tr. 1408-1410).[10] The district court stated at the conclusion of the hearing:

> The plaintiffs have failed to as of yet show a likelihood of prevailing on the merits of their claims at trial. And the legal issues presented in the dispositive motions now pending give me great doubt as to whether any of the claims asserted will survive the dispositive motion

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[10]It should be noted the only evidence in the record of disruption to university teaching relates to former plaintiff Susan Sayles, who was, according to her psychologist, driven to chronic depression as a consequence of the hostile environment in the department, and was unable to teach her classes. (Tr. 39, 42-43, 55).

> process. But certainly in consideration of the issuance of a preliminary injunction, the plaintiffs have at least not sufficiently persuaded me that the merits of the claims justify the issuance of an injunction at this time on those particular subjects that I have articulated or ruled on by this motion. *That is, they have not shown that the acts they claim as retaliation are caused or were committed with retaliatory motive*. (emphasis added) (Tr. 1403-1404).

This statement shows that the court was expecting grant preliminary relief only upon evidence of unlawful motive. Under these circumstance summary judgment is inappropriate and the court of appeals should have so found. It was, however, easier for the court of appeals to simply adopt the latter interpretations of the facts, which were in turn accepted by the district court, rather than undertake a cumbersome review of the entire record as it was required to do under this Court's precedents, drawing all reasonable inferences in favor of petitioners. This manner of summarily affirming summary judgment in favor of respondents in a complex case is a curtailment of petitioners right to trial by jury which, as such, must be "scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486, (1934).

### B. The district court abused its discretion in not granting petitioners' Rule 56(f) request for limited discovery

This Court has held that the plain language of Rule 56(c), authorizing the grant of summary judgment, "mandates the entry of summary judgment, after adequate time for discovery." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In the latter decision this Court further stated that "it is from this list [i.e., "depositions, answers to interrogatories,

and admissions on file, together with the affidavits"] that one would normally expect the nonmoving party to make the showing to which we have referred." *Celotex Corp.*, 477 U.S. at 324. Further, the Court noted that Rule 56(f), which allows the district court to grant a continuance of the summary judgment proceedings pending discovery, can address the problem of a party who is "'railroaded' by a premature motion for summary judgment." *Celotax Corp.*, *supra*, at 326. As Justice White, concurring, stated:

> But the movant must discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case. A plaintiff need not initiate any discovery or reveal his witnesses or evidence unless required to do so under the discovery Rules or by court order. Of course, he must respond if required to do so; but he need not also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his case. It is the defendant's task to negate, if he can, the claimed basis for the suit.

*Celotex Corp., supra,* at 328.

While the *Webb I* appeal was pending, this Court decided *Crawford-El v. Britton*, 523 U.S. 574 (1988), in which the Court held that "although evidence of improper motive is irrelevant on the issue of qualified immunity, it may be an essential component of the plaintiff's affirmative case." The Court also held that the *Harlow* rule precluding discovery, may not entirely foreclose discovery on the issue of motive. . . Discovery involving public officials is indeed one of the evils that *Harlow* aimed to address; but neither the

opinion nor subsequent decisions create an immunity from *all* discovery. *Harlow* sought to protect officials from the costs of "broad-reaching" discovery [citations omitted] . . . and we have since recognized that limited discovery may sometimes be necessary before the district court can resolve a motion for summary judgment based on qualified immunity.

*Crawford-El v, Britton*, 523 U.S. 574, 592 n. 14.

The district court gave three reasons for denying the motion. First, the motion for limited discovery on state of mind and workplace disruption issues had no supporting affidavits as Rule 56(f) requires. Petitioners did, however, fully explain in their motion that they had no way of offering the court any more admissible evidence of retaliatory or conspiratorial motive, or discriminatory intent, than it already had at the injunction hearing[11] without a reasonable opportunity to conduct discovery; that they are entitled to discovery to gather evidence of meetings, minutes of meetings, memoranda, etc.; that they have no access to statements of respondents or witnesses in their employ, no way of obtaining internal documents or other information within the respondents' exclusive possession. Affidavits of petitioners would have stated the same thing. Seventh Circuit and other case law and commentary indicate that strict compliance with the affidavit requirement is not fatal, *Farmer v. Brennan*, 81 F. 3d 1444 (7th Cir. 1995); *Pfeil v. Rogers*, 757 F. 2d 850 (7th Cir. 1985); *King v. Cooke*, 26 F. 3d 720 (7th Cir. 1994); *Snook v. Trust Co. of Georgia Bank of Savannah*, 859 F. 2d 865 (11th Cir. 1988); 27A Fed. Proc. L. Ed § 62:695, at 446-447 (1996). The district court's second ground for denial of limited discovery was that petitioners

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[11]Former defendant Wynola Richards, an assistant vice-president, testified that it was common knowledge within the university administration that the committee formed to investigate Webb's complaints, and him, was intended as a "firing squad." (Tr. 829, 836-837; Exhibit 289A, at 2).

had "more than ample time within which to marshal evidence and prepare responses in support of their opposition to dispositive motions. . . . [T]hey had more than 3 ½ months . . . [T]hey have failed to demonstrate why they could not have discovered such evidence as they now seek in the months this suit was pending prior to the conclusion of the briefing on the pending motions." (App 105a). As noted earlier, however, this Court's decision in *Crawford-El v. Britton* had not even been decided during the time period referred to by the court, so any earlier effort by petitioners would have been denied under *Harlow* and, in any event, resisted, so that a 3 ½ month delay when petitioners are being retaliated against and seeking preliminary relief should not in fairness be characterized as delay attributable to them. Petitioners were in a "catch-22" position, as they faced the kind of aggravated "railroading" Justice White referred to in the quotation from his concurrence cited above in *Celotex Corp. v. Catrett*: they had to seek injunctive relief, or seek discovery that established Supreme Court case law appeared to foreclose, and, if not foreclosed, try to depose 50 or less defendants in approximately 90 days.

The denial of limited discovery was also because petitioners had not shown why the six day hearing on the preliminary injunction request and evidence introduced therein "would be insufficient support for their conspiracy claims." (App. 108a). Yet, a hearing on preliminary relief, no matter how long and no matter how many documents petitioners introduced in support, is not the functional equivalent of discovery. Petitioners had no opportunity to propound interrogatories to respondents, request internal documents, or seek admissions before depositions. An evidentiary hearing, wherein a court makes evidentiary rulings, restricts lines of inquiry, strikes testimony, and sustains objections to testimony, etc., is not the equivalent of discovery, especially where the trial judge uses a stopwatch, as was done in this case, repeatedly warning counsel that he is running out of time (Tr. 910-911, 1023). Even the Seventh

Circuit in *Webb II* contemplated petitioners would upon remand engage in discovery: "We do not rule out the probability that on a more complete record plaintiffs may be able to show that scholarship and teaching proceeded at a normal pace while the intramural dispute festered." (App. 117a). Petitioners were never given the opportunity to develop a more complete record as contemplated by Rule 56. *See Xerox v. Genmoora Corp.*, 888 F. 2d 345 (5th Cir. 1989); *Carley v. Rosewood Care Center, Inc. of Peoria*, 142 F. 3d 1041 (7th Cir. 1998); *Resolution Trust Corp. v. North Bridge Associates, Inc.*, 22 F. 3d 1198 (1st Cir. 1994); *Timberlane Lumber Co. v. Bank of America, N.A. & S.A.*, 549 F. 2d 597 (9th Cir. 1976); *Lunderstadt v. Colafella*, 885 F. 2d 66 (3d Cir. 1989); *Messina v. Mazzeo*, 854 F. Supp. 116 (E.D.N.Y. 1994) 10B Wright, Miller & Kane, *supra*, § 2741, at 421-422. This failure is in conflict with this Court's opinions, and a departure from the accepted and usual course in summary judgment adjudication.

### C. The district court abused its discretion in striking portions of petitioners' affidavits and strictly enforcing its local rule governing summary judgment practice

Fed. R. Civ. P. 83(a)(1) authorizes district courts to promulgate local rules of procedure consistent with the Acts of Congress and the Federal Rules of Civil Procedure. Paragraph (a)(2) of that rule, however, provides that such local rules "imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement." Pursuant to Rule 83, the district court below promulgated its Local Rule 56.1. That rule requires, *inter alia*, a summary judgment movant to prepare a statement of issues of fact with appropriate references to supporting materials in the record; likewise, a nonmovant is required to submit a statement of genuine issues of material fact with

supporting references in opposition to the motion. "The policy of Rule 56(e is to allow the affidavit to contain all evidentiary matter which, if affiant were in court and testifying on the witness stand, would be admissible as part of his testimony." 6 Moore's Federal Practice § 56.22[1], at 1321-1322 (1982). Hearsay statements that would be admissible at trial as exceptions to the hearsay rule may be contained in the affidavit (*Id.* at 1322). *See also Pfeil v. Rogers, supra*; *Macuba v. Doeber*, 193 F. 3d 1316 (11th Cir. 1999); *Chambers v. Masters, Mates & Pilots Pension Plan*, 571 F. Supp. 1430 (D.C.N.Y. 1983)

A cursory review of the statements in Webb's affidavit of December 24, 1997 stricken in the district court's summary judgment (App. 23a-24a) on hearsay grounds shows that they would be admissible to establish notice or as admissions by the respondents. And the mere fact that there are conclusory portions in certain proffered genuine issues of fact did not justify the court's decision to ignore all of the non-hearsay evidence cited in support of that statement.[12] Moreover, there are almost no references in the district court's judgment to the testimony in the 6-day preliminary injunction hearing transcript consisting of more than 1400 pages, many portions of which were cited by petitioners in their Third Amended Statement of Facts. Therefore, strict application by the district court of both the Rule 56(e) requirement that affidavits be made on "personal knowledge" and set forth "such facts as would be admissible in evidence,"

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[12]For example, the court struck the ¶ 4 of the petitioners' Third Amended Statement of Genuine Issues (R. 150), which stated, "Whether plaintiff Webb and those who supported his opposition to misconduct, nonfeasance, and sexual harassment of students (i.e., plaintiffs Sayles and Wisner) were retaliated against by the defendants." Numerous instances of actions taken by respondents against petitioners were recited in support of that proposed issue, which the court erroneously struck as too broad and conclusory. The same can be said for the court's striking of portions of Webb's December 24, 1997, at ¶¶ 22, 28, and 29, and Wisner's affidavit of December 22, 1997, at ¶¶ 2, 3, 4, and 5).

and the requirement of its Local Rule 56.1 that materials in opposition to summary judgment be cited after each suggested statement of a genuine factual issue, resulted in the court's disregard of a mountain of evidence, a grant of summary judgment to respondents, and a denial of petitioners' right to trial by jury. The district court, therefore, compounded its abuse of discretion in both denying discovery, and then making the aforementioned rulings and others that stripped what evidence petitioners *did* have available to them, i.e., their own testimony and that of their witnesses at the injunction hearing that corroborated their claims, from the record, thus assuring summary judgment for the respondents. Strict application of Local Rule 56.1 on this case is the very thing contemplated, and prohibited by, Rule83(a) (2); it "cause[d] a party to lose rights because of a nonwillful failure to comply with the requirement. Under these circumstances, the court of appeals, by affirming these rulings, sanctioned such a departure from the accepted and usual course of judicial proceedings in the summary judgment context as to warrant this Court's exercise of its supervisory power.

## CONCLUSION

For the reasons stated above, petitioners pray for the issuance of a Writ of Certiorari to the Court of Appeals for the Seventh Circuit to review its order of October 25, 2000 (App. 1a-3a).

Respectfully submitted,
Jona Goldschmidt
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Chicago, IL 60660
Phone: 773-293-1250

(Any footnotes trail end of each document)

No. 00-1319

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GARY L. WEBB and MELISSA WISNER, Plaintiffs-Appellants,

v.

BOARD OF TRUSTEES OF BALL STATE UNIVERSITY, et al., Defendants-Appellees.

July 21, 2000 *, Submitted

* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary, and the appeal is submitted on the briefs and the record. See Fed. R. App. P. 34(a); Cir. R. 34(f).

October 25, 2000, Decided

COUNSEL:
For GARY L. WEBB, SUSAN L. SAYLES, MELISSA L. WISNER, Plaintiffs - Appellants: Jona Goldschmidt, Chicago, IL USA.

For BOARD OF TRUSTEES OF BALL STATE UNIVERSITY, FRANK A. BRACKEN, MARY L. CONRAD, CHAD A. DAVIS, JEFFREY H. SMULYAN, Defendants - Appellees: Scott E. Shockley, DEFUR,

VORAN, HANLEY, RADCLIFF & REED, Muncie, IN USA.

JUDGES:
Before Hon. RICHARD A. POSNER, Circuit Judge, Hon. FRANK H. EASTERBROOK, Circuit Judge, Hon. KENNETH F. RIPPLE, Circuit Judge.

OPINION:

Order

The nature of this case is discussed in our prior opinion, 167 F.3d 1146 (7th Cir. 1999), and the ensuing 87-page opinion by the district court. It is unnecessary to elaborate on the claims and suffices to say that we believe the district court's handling of them correct. We add only two thoughts.

First, it was unnecessary for the district court to address the eleventh amendment (see pages 26-27 of the district court's opinion), because 42 U.S.C. § 1983 does not authorize damages suits against states, state agencies, and state employees in their official capacities. Arizonans for Official English v. Arizona, 520 U.S. 43, 69, 137 L. Ed. 2d 170, 117 S. Ct. 1055 (1997); Will v. Michigan Department of State Police, 491 U.S. 58, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989). This statutory deficiency in plaintiffs' claim takes precedence. Vermont Agency of Natural Resources v. United States ex rel. Stevens, 146 L. Ed. 2d 836, 120 S. Ct. 1858, 1865-66 (2000).

Second, the district judge did not abuse his discretion in denying plaintiffs' motion to conduct additional discovery. The motion was made two years into the case, did not comply with Fed. R. Civ. P. 56(f), and was entirely abstract--that is, plaintiffs did not tell the judge what they expected to find, why they needed it, and how they expected the additional discovery to produce it. Their appellate brief has the same

deficiency. The district court was entitled to bring this litigation to a conclusion.

AFFIRMED

IP 97-1268-T/G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GARY L. WEBB and MELISSA WISNER,
Plaintiffs,

v.

BOARD OF TRUSTEES OF BALL STATE UNIVERSITY,
et al.,
Defendants.

Date: 1/5/2000

ENTRY REGARDING PENDING MOTIONS

On August 4, 1997, the Plaintiffs, Gary L. Webb, Susan L. Sayles and Melissa L. Wisner, commenced this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. and 42 U.S.C. § 1983. They allege that they were subjected to sexual discrimination and harassment, retaliation, violations of their Fourteenth Amendments due process rights and First Amendment rights, and that the Defendants conspired to deny them of these civil rights. The following motions are before the court: (1) the Defendant Wynola Richards' Motion to Dismiss; (2) the Defendants' Motion to Dismiss Pursuant to Federal Rule of Civil Procedure ("FED. R. CIV. P.") 12(b)(6); (3) the Defendants' First Motion for Partial Summary Judgment; (4) the Defendant, Board of Trustees of Ball State University's Second Motion for Summary Judgment; (5) the Defendants' Motion to Strike Affidavits; (6) the Defendants' Request for

Oral Argument; (7) Defendant Wynola Richards' Petition for Award of Attorney Fees; (6) the Defendants' Verified Petition for Bill of Costs; and (9) the Plaintiffs' Motion for Disqualification of Counsel. This entry addresses the first eight motions.

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## I. BACKGROUND fn1

### Introduction

Ball State University ("Ball State," the "University," or "BSU") is an agency of the State of Indiana located in Muncie, Indiana in the Southern District of Indiana. Ball State is governed by a Board of Trustees (the "Board") empowered by state law to perform various acts necessary to discharge its duties. At all relevant times, Dr. John E. Worthen was the President of Ball State. As President, he has the final responsibility for the appo(ntment, retention and reassignment of department chairpersons. Plaintiff Gary L. Webb is a tenured Associate Professor in the Ball State Department of Criminal Justice and Criminology (the "Department"), which is part of the College of Sciences and Humanities (the "College") at the University. Plaintiff Susan L. Sayfes is a nontenured Assistant Professor in the Department and has been a member of the faculty since the I

993a1 994 academic year. Plaintiff Melissa L. Wisner (formerly Reeder) was the Department's Administrative Coordinator from May I 996 until March 1997. She has since been the Programs Assistant in the Center for Environmental Design, Research and Service in the College of Architecture and Planning ("CAP").

Webb was hired July 1 , 1991 , and appointed by President Worthen to a three-year term as Chairperson of the Department. Based on a positive recommendation from the Department faculty; Ronald L. Johnstone, Dean of the College; and C. Warren Vander Hill, the Provost and Vice President for Academic Affairs, President Worthen reappointed Webb as Chairperson of the Department effective July 1 , 1994, for a term expiring June 30, 1997. (Worthen Aff. ¶4)

At all relevant times until June 30, 1995, Dr. Wynola Richards was the Assistant Provost and Director of the Ball State Office of Affirmative Action. Drs. Richards and Webb dated from the fall of 1991 until October 1993. (Richards Aff., Ex. 3 to Deft.' App., ¶¶ 1, 2.)

Webb's First Report of Alleged Sexual Harassment

In April 1994, Webb reported to Dr. Richards that a student had complained to him of sexual harassment by a Department faculty member, M. Steven Meagher. After an investigation by the Office of Affirmative Action, Richards concluded that, due to a prior dating relationship between Meagher and the student and the fact that the student was not a student in one of Meagher's classes or supervised by him, the University's sexual harassment policy probably had not been violated. (Richards Aff. ¶ 4.) Believing Meagher's

conduct violated the anti-exploitation provisions of the Faculty Handbook, however, Richards referred the matter to the Academic Freedom and Ethics ("AF&E") Committee. Shortly thereafter, Webb met with Meagher to demand his resignation and advise him that if he did not resign, Webb would recommend his immediate termination. (Id. ¶ 6.) At that time, Richards understood that Meagher had informed the Provost that he intended to resign as soon as he found another position. (Id.) Before the AF&E Committee was able to proceed on Dr. Richards' formal allegations against Meagher, Meagher resigned. Thus, Richards withdrew her request that the Committee review Meagher's conduct, believing his resignation rendered the issue moot. (Id. ¶ 8.)

Cotlar's Complaint Against Webb

On September 25, 1994, Andrew Cotlar, a Department faculty member, sent a letter to the Chairperson of the University Senate Professional Affairs Council complaining about alleged inappropriate behavior and rule violations by Dr. Webb. The matter was forwarded to the AF&E Committee. In October 1994, the Committee Chair, Dr. Christopher Airriess, received a formal charge from Cotlar accusing Webb of ethical violations, inappropriate behavior and violation of academic freedom. (Airriess Aff., Ex. 4 to Deft.' App., ¶ 3.) Because of her prior relationship with Webb, Richards, an ex officio member of the Committee, requested to be replaced on the Committee during its consideration of Cotlar's complaint. The Provost appointed B. Thomas Lowe as her replacement. (Richards Aff. ¶ 9.)

The AF&E Committee met in late October 1 994 and decided to hold a hearing on Cotlar's complaint against Webb on November 21 , 1994. Notices were sent to both Webb and Cotlar, requesting them to appear at the hearing. A

copy of Cotlar's complaint also was sent to Webb. Webb responded with a letter to the AF&E Committee stating that Cotlar's complaint was harassing and refusing to appear before the Committee. (Airriess Aff. ¶ 4.) The Committee proceeded to investigate the complaint. (Id.)

While Cotlar's complaint was pending before the AF&E Committee, Cotlar asked Dean Johnstone and Provost Vander Hill to review the teaching assignments Webb had given him. They did and concluded that Cotlar lacked the proper credentials to teach the Research Methods class which Webb assigned to him. They also concluded that Webb was harassing Cotlar with the assignment and relieved Cotlar of the responsibility to teach the class. (Johnstone Aff. ¶ 3.) Webb objected to the decision to relieve Cotlar of that responsibility and declined Johnstone's request to meet with the students to inform them the class was being canceled. (Id.) As a result, Johnstone did so. (Id.)

Throughout January 1 995, the AF&E Committee received numerous charges from faculty in the Department: Six charges were filed by four different faculty against eight other faculty and/or administrators including Johnstone, Richards, Cotlar and others. The Committee determined in March 1 995 that, with one exception not relevant to this action, these charges were baseless. (Id. ¶ 5.)

On March 29, 1995, the AF&E Committee found in favor of Cotlar on 4 of his 6 allegations against Webb and unanimously recommended to the Provost that certain documents be removed from Cotlar's file and that Webb be reprimanded. (Id. ¶ 7.)

Webb's Second Report of Alleged Sexual Harassment

Webb contacted Richards by memorandum dated February 28, 1 995, indicating that he had become aware of inappropriate behavior by Cotlar toward a student a year before. Richards interviewed the student and recommended she pursue a sexual harassment complaint against Cotlar, but the student declined. (Richards Aff. ¶ 10.)

On March 1 , 1995, Webb filed a complaint with the AF&E Committee against Cotlar based upon alleged sexual harassment of the student. The complaint was referred to the University's Office of Affirmative Action. On March 27, 1995, Webb filed another complaint against Cotlar with the AF&E Committee based upon the same and some additional allegations. The Provost decided the allegations against Cotlar need not be pursued further because Cotlar had resigned. (Airriess Aff. ¶ 9.)

The Ad Hoc Committee

On or about June 30, 1995, Webb delivered to President Worthen's office a 225-page memorandum addressed to the Board of Trustees and Richards. The memorandum complained of alleged mistreatment of Webb and the Department by the Dean and Provost's Offices as well as the Affirmative Action Office. He requested the Board to take action, including holding a hearing.

On July 17, 1995, the Board President, James Parks, responded to Webb that the Board does not ordinarily conduct hearings in cases over disagreements between academic departments and the Dean's and Provost's Offices.

(Worthen Aff. ¶ 7) Parks referred Webb's memorandum to President Worthen who in July 1995 appointed an ad hoc committee to investigate the concerns raised in the memorandum and any other issues arising from the conflict involving the Department and the Dean's and Provosts' Offices. In a letter to President Worthen dated September 13, 1995, Webb objected to the ad hoc committee and accused Worthen of retaliation and harassment. (Id. ¶ 8)

The ad hoc committee interviewed Webb and other witnesses before issuing its report on November 21 , 1995. It presented three possible solutions, including Webb's removal from his position of Chair of the Department, Dean Johnstone's removal, and leaving Webb and Johnstone in their positions and attempting to resolve their differences. The report was given to both Webb and Johnstone who submitted wriften responses. Upon considering the ad hoc committee's report and the responses of Webb and Johnstone, President Worthen decided not to remove either Webb or Johnstone. (Worthen Aff. ¶ 9.)

Departmental Tensions Rise

By the fall semester of the 1996-97 academic year the majority of the Department faculty no longer supported Webb. In November 1996, the Department faculty held an election and recommended that James E. Hendricks be appointed Department Chair upon the expiration of Webb's term. Upon receivihg favorable recommendations from Dean Johnstone and Provost Vander Hill, President Worthen appointed Hendricks as Chair, effective July 1 , 1997. (Id. ¶¶ 4, 10.) Also in November 1996, Johnstone received a memorandum signed by six "concerned faculty' requesting the removal of Webb, Sayles and Wisner from their administrative positions in the Department at the end of the

Fall Semester. (Johnstone Aff. ¶ 9, Ex. O.)

In November and December 1996, the University's Affirmative Action Office received 4 complaints of discrimination and 3 complaints of harassment from faculty members in the Department against other faculty members of the Department. (Falling All. ¶ 3) fn2 President Worthen subsequent(y was informed by Sail Falling, the University's Director of Equal Opportunity and Affirmative Action since July 1 , 1995, that these charges had been filed with her office by Department. (Worthen Aff. ¶ 10.) Ms. Falling investigated the charges and issued her findings on March 20, 1997, concluding that the allegations did not amount to discrimination or harassment under University policies. She further concluded that most of the complaints properly could be characterized as ongoing departmental conflicts, misuse of departmental resources or similar irregularities. (Falling Aff. ¶ 5.) Webb responded by accusing Falling of harassing him and failing to follow University Affirmative Action procedures. (Id. ¶ 6.)

On December 2, 1996, the Departmental P&T Committee gave positive tenure recommendations to two faculty members who were not supporters of Webb: Bryan Byers and Michael Brown. The Committee was unable to reach a majority for or against Taiping Ho, another faculty member who did not support Webb. On January 6, I 997, Webb, as Chair, tssued letters expressing his opinion that none of the three was making satisfactory progress toward tenure. Dean Johnstone, however, supported the P&T Committee's recommendations. (Johnstone Aff. ¶ 10.)

Webb's Removal as Department Chairperson

In January 1997, faculty members Hendricks and Byers complained to Dean Johristone that Webb had harassed and retaliated against them since Hendricks' election as the new Chair. (Johnstone Aff. ¶ 11,, Ex. T.) They claimed that their 1997 summer session teaching assignments had been altered and expressed other concerns about the 1997-98 teaching schedules. Dean Johnstone directed Webb to change the summer session teaching assignments, but he would not do so.

In February 1997, Dean Johnstone recommended to Provost Vander Hill that Webb be removed as Chair because he had ignored the Dean's directives and because Johnstone concluded that the atmosphere in the Department was harming students and faculty. (Id.) Provost Vander Hill subsequently sent Worthen a letter from Dean Johnstone requesting the removal of Webb as Chair, which was accompanied by Provost Vander Hill's letter supporting that request. (Worthen Aft. ¶ 10, Exs. V, W.) Johnstone cited an atmosphere in the Department which was "tense and debilitating in the extreme," (Id., Ex. V at 1), and acts of insubordination by Webb. (Id.) Vander Hill noted Webb's refusal to work with Johnstone or Hendricks to provide for an orderly transition between the outgoing and incoming Chairpersons and the effect on the students. (Id., Ex. W at 1.) After giving Webb an opportunity to respond before making any decisions, Worthen removed Webb as Chair of the Department, effective March 4, 1997. (Id. ¶¶ 4, 10.) Worthen directed Dean Johristone to appoint an interim Chair. Johnstone appointed Hendricks. (Id. ¶ 10; Johnstone ¶ 11.)

Sayles' Denial of Promotion

During the 1996-97 academic year, Sayles applied for

promotion to the rank of Assistant Professor. Under the relevant promotion rules, a faculty member must receive a favorable recommendation from his or her departmental P&T Committee in order to have his or her name forwarded to the College P&T Committee for consideration. Because the Department P&T Committee did riot give Sayles a majority vote in the area of research and scholarly activity, she did not receive a favorable recommendation from the Committee. Sayles appealed the Committee's decision, alleging procedural violations, discrimination and unfair treatment, The Committee denied her appeal on reconsideration. (Johnstone Aff. ¶ 12.)

Sayles subsequently appealed the decision to the College P&T Committee hearing panel, which held a hearing and determined there were no procedural violations and no evidence of gender-based discrimination or unfair treatment. The College Committee denied the appeal, and Sayles then appealed to the University P&T Committee. Following a hearing, the University Committee unanimously voted to deny Sayles' appeal. Sayles requested a conference with the Provost, but it was denied as belatedly filed. (Id. ¶ 13.)

Wisner's Transfer

In November 1996, following the election of Hendricks as incoming Department Chair, Norman Beck, the University's Executive Director of Human Resources met with Wisner regarding a transfer from the Department. He was aware of the conflict in the Department and aware that both Wisner and Hendricks had accused the other of harassment as well as other charges. Because Wisner was the Department's Administrative Coordinator, requiring her to work closely with the Department Chair, Beck believed that

Wisner's transfer might avoid a potentially problematic relationship.

(Beck Aff., Deft.' App. Ex. 7, ¶ 2.) Wisner declined to transfer.

Over the next 4 months things deteriorated. Wisner filed two EEOC charges against Hendricks, alleging harassment, retaliation and sex discrimination. When Webb was removed as Chair, Wisner and Hendricks were in direct working contact. Beck believed that a transfer was necessary for the best interest and benefit of Wisner, the Department and the University. (Id. ¶ 3.) He therefore transferred Wisner to a newly created position as Programs Assistant in the Center for Environmental Design, Research and Service in the Office of the Dean of CAP. This new position carried the same salary and grade as Wisner's former position as Administrative Coordinator. (Id.)

EEOC Charges and Judicial Complaints

On September 21 1995, Webb filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging that he was being retaliated against for ending a relationship with Richards in 1993. He checked the boxes for "Sex and "Retaliation" as the "Cause of Discrimination" (Compl., Ex. I ) In the "Particulars" section of the charge Webb alleges:

> I.) I have been retaliated against after ending an affair with my supervisor by beinging (sic) harassed, disciplined, low evaluations and pay raise, and cutting of my budget.

> II.) I believe that I have been retaliated against for protesting something unlawful under Title VII of the 1964 Civil Rights Act as amended.

(Id.)

Sayles also filed a Charge of Discrimination with the EEOC, on September 21, 1995. Sayles checked the boxes for uSexn and "Retaliation" as the "Cause of Discrimination." In the "Particulars" section she alleges:

> I.) in January 1995 1 complained to the Respondent [the University] about being sexually harassed by a co-worker. After filing I have been continuously retaliated against for supporting a co-worker who was protesting unlawful acts covered by Title VII.
>
> II.) I believe that I have been discriminated and retaliated against which are in violation of Title VII of the I 964 Civil Rights Act as Amended.

(Compl., Ex. 9.)

On December 20, 1996, Sayles filed a second Charge of Discrimination with the EEOC, alleging retaliation and age discrimination arising out of her having been barred from promotion. She checked the boxes for "Retaliation" and "Age" under the "Cause of Discrimination." (Id., Ex. 8.)

Also on December 20, Wisner filed her first Charge of Discrimination alleging harassment against Hendricks and retaliation for supporting employees who complained about discriminatory practices. In the body of this charge, Wisner alleges that she has been harassed and had her job threatened

"for supporting and giving witness for employees complaining about discriminatory actions." (Id. , Ex. 13.) She also alleges that "Hendricks has verbally sexually harassed me by commenting on my body shape and weight. Hendricks has also given me unwelcomed sexual whistles and winks." (Id.)

On February 7, 1997, Webb and Sayles commenced an action against the Board of Trustees in the Superior Court of Delaware County, Indiana, asserting federal and state claims for injunctive relief. The Board petitioned for removal to this court, and at a hearing on February 20, 1997, Webb and Sayles represented that they would file an amended complaint in state court dropping the federal claims. Based on that representation, the court remanded the case to Superior Court where an amended complaint was filed. The request for a prefiminary injunction was denied.

On February 27, 1997, Webb and Wisner filed further Charges of Discrimination, alleging retaliation. In his second EEOC Charge, Webb checked the box only for "Retaliation" as the "Cause of Discrimination." (Compl., Ex. 2.) He alleged that since filing his first EEOC charge he was subjected to harassment in the form of: (1) two parking tickets in December 1996; (2) five anonymous letters dated February 8, 1997, sent to local media alleging his was part of a "sex for grades" scandal; (3) beginning on February 12, 1997, denial of access to the University computer system; (4) a change on February 14, 1997, without warning, in the summer schedule; (5) circulation on February 11, , 1997, of a phony list of correspondence courses in the Department; (6) false accusation against the Department for poor perFormance; and (7) Affirmative Action Director Sali Falling's claim of secret complaints against him, Sayles and Wisner and Falling's refusal to discuss them with him. (Compl., Ex. 2 at 1-2.)

Webb neither checked the "Sex" box nor referred to sexual harassment in the body of his second Charge

In March 1997, Webb, Saytes, and Wisner each filed another Charge of Discrimination, alleging retaliation. In his third Charge, Webb checked the box only for "Retaliation" as the "Cause of Discrimination." (Compl., Ex. 3.) He alleged that he was removed from his position as Chair of the Department on March 3, 1997. (Id.) Webb neither checked the "Sex" box nor referred to sexual harassment in the body of his third Charge. In her third charge, Sayles checked only the "Retaliation" box as the "Cause of Discrimination." (Compl., Ex. 7.) Sayles alleged that she was retaliated against in March 1997 in that she was demoted from her position as Assistant Chair of the Department to a regular Assistant Professor position, removed from her office, and removed from her role as Internship Co-Director, and scheduled to teach classes at times Hendricks knew she disliked. (Id., Ex. 7.)

Procedural History

On August 4, 1997, the Plaintiffs commenced this action by filing their Complaint. The Complaint contains twelve counts. In Counts I and II, Webb alleges violations of Title VII of the Civil Rights Act of 1964 against the Board of Trustees, asserting theories of sexual harassment and retaliation, respectively. Count III asserts that the defendants violated 42 U.S.C. § 1983 in depriving Webb of liberty and property protected under the Fourteenth and First Amendments. Count IV alleges the defendants conspired to deprive Webb of his civil rights. In Count V, Sayles alleges a disparate treatment theory of sex dtscrimination under Title VII against the Board. Count VI asserts that the Board

retaliated against Sayles in violation of Title VII retaliation. Counts VII and VIII make Sayles' Section 1983 civil rights and conspiracy claims, respectively, against the defendants. Wisner claims disparate treatment by the Board in violation of Title VII in Count IX, and Count X is her Title VII retaliation claim against the Board. Wisner's Section 1983 civil rights and conspiracy claims are made in Counts XI and XII, respectively.

On October 15, 1997 Defendant Richards filed her Motion to Dismiss, and the University Defendants filed their Motion to Dismiss Pursuant to Federal Rule of Civil Procedure ("FED. R. CIV. P.") 12(b)(6) and Defendants (sic) First Motion for Partial Summary Judgment. On October 29, 1997, the University Defendants filed their Second Motion for (Partial) Summary Judgment.

On October 30, 1997, the Plaintiffs moved for an enlargement of time within which to respond to the dispositive motions filed by Richards and the University. The court granted that motion and gave the Plaintiffs until January 2, 1998, within which to respond.

On December 12, 1997, the Plaintiffs filed their Motion for Preliminary Injunction.

On December 29, 1997, the Plaintiffs filed Plaintiffs' Statement of Genuine issues ("Statement") and Plaintiffs' Response to the Defendants' Motions to Dismiss and for Summary Judgment. The Defendants filed a brief in reply on December 29, 1997.fn3

The court held a five-day preliminary injunction hearing on December 30 and 31, 1997, and January 2, 5, and 6, 1998. The Plaintiffs' request for preliminary injunction was denied in part.

Upon the Plaintiffs' request, the court allowed them to supplement their Statement of Genuine Issues, which they did on January 21 , 1998, and again on January 22, 1998, by filing their Addendum to Plaintiffs' Supplemental Statement of Genuine issues ("Addendum") and Plaintiffs' Supplemental Statement of Issues ("Supplemental Statement"), respectively. Also on January 22, 1998, the Plaintiffs' Supplemental Response to Defendants' Motions to Dismiss and for Summary Judgment and Memorandum in Support was filed.

On February 4, 1998, the Defendants filed a brief in response to the Plaintiffs' supplemental brief

On February 5, 1998, the Plaintiffs appealed this courts decision denying in part their motion for preliminary injunction. On February 11, , 1998, upon the Plaintiffs' motion, the court stayed the proceedings in the district court pending a decision on the Plaintiffs' appeal.

The Court of Appeals for the Seventh Circuit affirmed this courts decision denying the Plaintiffs' motion for preliminary injunction.

The stay in this case was lifted on August 19, 1999.

On their motion, the Plaintiffs were afforded an opportunity to file yet a Third Statement of Genuine Issues of

Material Fact ("Third Statement"). They did so on September 3, 1999. This Third Statement encompasses the Plaintiffs' Statement, Supplemental Statement and Addendum. It does not add any statement of a genuine issue that was not contained either within the Statement, the Supplemental Statement or the Addendum; rather, it contains additional citations to the record as support for the statements asserted therein. On September 8, 1999, the Defendants filed their response to the Third Statement.

## II. DEFENDANT RICHARDS' MOTION TO DISMISS

The Defendant Wynola Richards moves, pursuant to FED. R. CIV. P. 12(b)(1) and 12(b)(6), for dismissal of the action against her individually. She asserts that this action against her individually is barred by the applicable statute of limitations, which is provided by Indiana Code § 34-1-2-2 and is two years.

In the Plaintiffs' Response to Defendants' Motions to Dismiss and for Summary Judgment, the Plaintiffs concede that the applicable limitations period is two years and concede that "Richards' acts for purposes of this count -- [Count III] occurring more than two years prior to the filing of the complaint require that she be dropped as a defendant." (Pls.' Response to Deft.' Mots. to Dismiss and for Summ. J. at 4.) (Emphasis in original).fn4

The § 1983 action against Ms. Richards arises from her alleged conduct which occurred during her employment with the University. Richards was employed by the University only until June 30, 1995, and this action was commenced on August 4, 1997. Thus, this action was not commenced within the two year limitations period.

Therefore, Defendant Richards' motion to dismiss is GRANTED and the § 1983 claim against Defendant Richards individually, asserted in Count III of the Complaint, will be

DISMISSED.

## III. DEFENDANTS' MOTION TO STRIKE AFFIDAVITS

The Defendants move to strike portions of the affidavits, filed on December 12 and 24, 1997, of Webb, Sayles and Wisner. The Plaintiffs have not responded to this motion.

Rule 56(e) of the Federal Rules of Civil Procedure requires that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." FED. R. Civ. P. 56(e). Conclusory statements, statements based on speculation or conjecture, and statements outside the affiant's personal knowledge are insufficient under Rule 56(e). See Stagman v. Ryan, 176 F.3d 986, 995 (7th Cir. 1999); Haywood v. North American Van Lines, Inc., 121 F.3d 1066, 1071 (7th Cir. 1997) (stating that conclusory allegations and self-serving affidavits unsupported by the record do not create a genuine issue of material fact for trial). Such statements must be disregarded by the court when considering a motion for summary judgment. Adusumilli v. City of Chicago, 164 F.3d 353, 359 (7th Cir. I 998) (upholding district court's decision to strike plaintiff's statement regarding reasons co workers allegedly harassed her because it lacked foundation and was not within plaintiffs personal knowledge); Schertz v. Waupaca County, 875 F.2d 578, 582 (7th Cir. 1989) (district court properly

disregarded affidavits based on information and belief). Further, "a party may not rely upon inadmissible hearsay in an affidavit or deposition to oppose a motion for summary judgment." Bombard v. Fort Wayne Newspapers, Inc.,

92 F.3d 560, 562 (7th Cir. 1996).

The court has reviewed the portions of the Plaintiffs' affidavits which are the subject of the Defendants' motion to strike. As the Defendants argue, those portions contain inadmissible hearsay, make conclusory allegations, assert ultimate conclusions and/or are not based on the affiant's personal knowledge. Therefore, the court GRANTS the Defendants' motion to strike as to the following paragraphs or portions thereof in the Plaintiffs' affidavits:

Webb's Affidavit of 12/24/97:

¶ 3: (a) statement beginning "on or about April 12, 1994, Angie Shay came to my office and explained"; . . ."; (b) statement that "I was repeatedly told that Dr. Meagher"; . . ."; (c) statement beginning "Contrary to John Worthen's assertion that Wynola Richards had informed him of the sexual harassment charge"; . . ."; and (d) the last sentence in ¶ 3. ;5

¶ 6: (a) "Contrary to John Worthen's affidavit he did not refer my complaint to an ad hoc committee.... He referred my complaint to subordinates beholding to him and Warren Vander Hill for their positions and salary."; and (b) "This ad hoc committee was not a good faith efforts it was nothing more than a scheme to defame me."

¶ 8: "The ad hoc committee was used to retaliate against me. It was used as a tool to harass and defame me... . . . because I filed an EEOC complaint in September, 1995"

¶10.

¶ 12: last two sentences.

¶ 13; "The other instructor, David Morris. . . These qualities resulted in his termination"

¶ 14: last sentence.

¶¶ 18 and 19.

¶ 20: last sentence.

¶¶ 22, 23, 24, 27, 28, 29, 30, 31 , 32, 33 and 34.

Sayles' Affidavit of 12/22/97;

¶ 3

¶ 5: (a) "is full of falsehoods and lies and is obviously a pretext . . . and it is in direct response to my filing Affirmative Action complaints against them." and (b) last sentence.

¶ 6: last two sentences.

¶ 7: last sentence.

¶ 8: last sentence.

¶ 9: last two sentences.

¶ 10.

¶ 11 : (a) first sentence; (b) "I knew then that he had not shared this information with the Committee"; . . . (c) "It was obvious to me the Committee was biased against Dr. Webb . . ."

¶ 12:

¶ 14: last sentence.

¶ 16: third sentence and last sentence.

¶ 17: last two sentences.

¶18.

¶ 19: last three sentences.

¶ 20: (a) "Hendricks' statements regarding this event are erroneously stated and are a pretext for denying me the promotion; . . ; (b) "it also demonstrates a clear conspiracy... to assist them in thwarting my eventual progress toward tenure and promotion".

¶21.

¶ 23: "This is another example of the conspiracy to harm me . . .

¶ 24: "However, I was now allowed to have a copy of the additional 220 pages of ties, innuendos, falsehoods and misstatements".

¶¶ 25 and 31.

¶ 35: last two sentences.

Wisner's Affidavit of 12/22/97:

¶¶ 2, 3 5.

¶ 11: last sentence.

¶ 15: last sentence.

Webb's Affidavit filed 12/12/97:

¶¶ 4, 5 and 6.

¶ 7(D), (I) and (L).

Sayles' Affidavit filed 12/12/97:

¶¶ 4, 5 and 6.

Wisner's Affidavit filed 12/12/97

¶¶ 4 and 5.

The court will disregard the aforementioned paragraphs or portions thereof in determining whether the Plaintiffs have come forward with sufficient evidence to create a genuine issue of material fact.

## IV. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). When deciding a summary judgment motion, the court must construe the evidence and draw all reasonable inferences based on the evidence in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

Once a properly supported summary judgment motion is made, the nonmovant must "go beyond the pleadings" and designate specific facts to support or defend each element of the claim, demonstrating a genuine issue for trial. Celotex, 477 US. at 322-23. To defeat summary judgment, the nonmovant must show "sufficient evidence supporting the claimed factual dispute." Anderson, 477 U.S. at 249. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Id. at 249-50. A mere scintilla of evidence does not suffice to defeat summary judgment. Id. at 252. Not every factual dispute creates a barrier to summary judgment. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. at 248.

## V.PLAINTIFFS' THIRD AMENDED STATEMENT OF GENUINE ISSUES

Before delving into the dispositive motions, the court believes it should comment on the sufficiency of the Plaintiffs' Third Statement of Genuine Issues.fn6 Because the dispositive motions were filed before the effective date of the current version of Local Rule 56.1 (January 1, , 1999), the

court is not applying the amendments of that rule. Instead, the court relies on the rule as written at the time the dispositive motions were filed in 1998.

Many of the Plaintiffs' statements of genuine issues ("SGI") are not material or relevant given the bases of the court's ruling on the dispositive motions: 1, , 2, 3, 5, 11, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 26, 27, 28, 29, 31 and 32. (These numbers refer to the paragraph numbers in the Third Statement.) Others are not probative of any of the Plaintiffs' claims: 8, 9, 10, 12, 19, 20, 21, 22 and 30. Still others--6,fn7 7,fn8 34,fn9 37,fn10 40 and 41 fn11—are not substantiated by the evidence cited to support them. SGI #4 is so overly broad, general and conclusory that it does not constitute a proper statement of a genuine issue. It does not set forth any specific fact showing a genuine issue for trial.12 SGI #4 is nothing other than a restatement of the Plaintiffs' retaliation claims. SGI #39 suffers from like deficiencies. SGI #31 and #36 also are overly broad, too general and conclusory.

Though their complaints against the Defendants are several, the Plaintiffs' Third Statement fails to demonstrate any genuine issues of material fact necessitating trial.

VI. DEFENDANTS' MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE ("FED. R. CIV. P.") 12(b)(6)13

The Defendants move for summary judgment on the Plaintiffs' § 1983 civil rights and conspiracy claims asserted in Counts III, IV, VII, VIII, XI and XII. The Defendants contend the Complaint fails to allege: a protected property or liberty interest; facts sufficient to constitute a deprivation of

constitutional due process; that the Plaintiffs engaged in speech protected by the First Amendment; the essential elements of a §1983 conspiracy; and that Defendant Aldridge was a state actor. They also argue that the § 1983 claims are barred by the Intracorporate Conspiracy Doctrine, that the Complaint fails to state a claim for a constitutional tort based upon an allegedly defamatory newspaper article, and that they are entitled to Eleventh Amendment immunity in their official capacities from civil damages. Because it is jurisdictional, the court now considers the Eleventh Amendment bar.

A. Eleventh Amendment

The Defendants contend, and the Plaintiffs concede, that the Eleventh Amendment bars any § 1983 damages claims against the Board of Trustees and the University employees in their official capacities. See Kentucky v. Graham, 473 U.S. 159, 169 (1985); Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 100-01 (1984); Marie O. v. Edgar, 131 F.3d 610, 615 (1997). Thus, to the extent Counts Ill, IV, VII, VIII, XI and XII seek damages, these Counts fail to state a claim upon which relief can be granted against the Defendant Board and individual Defendants in their official capacities. Accordingly, the court GRANTS the Defendants' Motion to Dismiss as to the § 1983 damages claims against the Board and the individual Defendants in their official capacities (asserted in Counts III, IV, VII, VIII, XI and XII) and will DISMISS these claims for want of jurisdiction.fn14

B. Denial of Civil Rights Under § 1983

To prevail on a claim under 42 U.S.C. § 1983, a

plaintiff must prove that: (1) he or she was deprived of an interest secured by the Constitution or laws of the United States, and (2) that deprivation was committed by a person or persons acting under color of state law. See Parratt v. Taylor, 451 U.S. 527, 53 1-35 (1981); Gomez v. Toledo, 446 U.S. 635, 640 (1980); Wright v. Associated Ins. Cos., Inc., 29 F.3d 1244, 1249 (7th Cir. 1994). In the absence of a violation of a federal right, a plaintiff cannot prevail on a § 1983 claim. Graham v. Connor, 490 U.S. 386, 393 (1989) (Section 1983 "is not itself a source of substantive rights"). The Plaintiffs allege violations of their due process rights under the Fourteenth Amendment. They also allege that they were retaliated against for exercising their rights to free speech under the First Amendment.

1. Fourteenth Amendment Due Process

To state a claim for a violation of the Fourteenth Amendment Due Process Clause, a plaintiff must allege that: (1) he or she had a protected life, liberty or property interest; and (2) he or she was deprived of that interest without due process of law.

See Parratt, 451 U.S. at 531-35. The Plaintiffs allege deprivations of both property and liberty interests.

a. Property Interests

"The Fourteenth Amendment's due process guarantee applies to public employees who have a 'property interest' in the terms or conditions of their employment." Colburn v. Trustees of Ind. Univ., 973 F.2d 581, 589 (7th Cir. 1992).

Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972); see also Border v. City of Crystal Lake, 75 F.3d 270, 273 (7th Cir. 1996). "[A] protected property interest in employment can arise from a statute, regulation, municipal ordinance, or an express or implied contract...." " Border, 75 F.3d at 273. "To have a property interest in a benefit, a person... must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Roth, 408 U.S. at 577.

In Colbum, a case quite similar to the instant case, the plaintiffs argued that they were entitled to due process in connection with their tenure and reappointment based on the criteria and procedures set forth in the university's handbooks and their employment contracts. Colbum, 973 F.2d at 589. The Seventh Circuit disagreed, explaining that general statements that an employee will be judged on the basis of some criteria does not create a property interest. Id. Instead, to create a property interest, the employer's discretion must be "clearly limited so that the employee cannot be denied employment unless specific conditions are met." Colbum, 973 F.2d at 589; see also Ledford v. Sullivan, 105 F.3d 354, 357 (7th Cir. 1997); Cain v. Larson, 879 F.2d 1424, 1426 (7th Cir. 1988). Concluding that the employer's discretion was not so limited, the court held that the plaintiffs had no property interest in their reappointment and not being denied tenure. Colbum, 973 F.2d at 589-90.

The Plaintiffs contend that Webb has a property interest in his continued employment because he is a tenured professor. (Pls.' Supplemental Resp. to Defs.' Mots. to

Dismiss and for Summ. J. and Mem. in Supp. at 3.) They add that if "the defendants attempt to terminate him without just case, he would be entitled to raise a claim of deprivation of that property interest without due process under the Fourteenth Amendment." (Id.) There is, however, no evidence nor even a claim that any defendant has attempted to terminate Webb's employment. Thus, Webb's due process claim has no basis in an alleged deprivation of his property right to his continued employment.

"Procedural interests under state law are not themselves property rights that will be enforced in the name of the Constitution." Swartz v. Scruton, 964 F.2d 607, 610 (7th Cir. 1992) (quotation omitted). Thus, Webb's allegations about the proceedings of the ad hoc committee fail to allege a deprivation of any property interest of Webb.15 Similarly, Webb's allegation of a "denial of rights to substantive and procedural due process under BSU regulations" by the actions of the AF&E Committee do not sufficiently allege a deprivation of a property interest protected by the Fourteenth Amendment. There is no evidence that the AF&E Committee deprived Webb of any property interest.fn16 Thus, his complaint about its procedures falls to state a § 1983 claim.

Webb's other claims of deprivation of property interests also fail. He alleges that on July 1, 1995, he received a pay raise which was below average and the lowest given to the University's department chairs, but he does not allege, and there is no evidence, that he had anything other than a unilateral expectation of a better raise. He does not allege or produce evidence that the University's decision with respect to his raise was clearly limited so that he could not be denied a certain raise unless specific conditions were met. Like the plaintiff in Swartz, Webb fails to establish a property right in his pay raise. See Swartz, 964 F.2d at 610 ("While Swartz

may have an expectation of a merit pay increase, he has no property right. . . to a specific amount of a merit pay increase because his merit pay is based on multiple layers of contingency.") (emphasis in original).

Webb also complains about his removal in February 1997 from his position as Chair of the Department. He has not, however, alleged or proved any facts from which the determination could be made that he had a legitimate claim of entitlement to his Chair position. Neither his academic rank nor his pay were affected by his removal as Chair. Furthermore, there is unrebutted evidence that a department chair serves at the pleasure of the President. (Worthen Aff. ¶ 3.) Thus, Webb had no property interest in his position as Chair.

The Plaintiffs contend that Sayles had a property right in the following: (1) her application for promotion and tenure, (2) the AF&E Committee's decision against her, (3) the Affirmative Action Officer's refusal to act on her sexual harassment complaints, (4) Johnstone's removal of her from the classroom, and (5) his decision to relieve her of her teaching duties for the spring 1998 semester. Sayles has not alleged or proved any facts which would support a claimed property interest in any of these.

Though the Plaintiffs argue that Ball State's Faculty and Professional Handbook creates property interests for both tenured and tenure-track faculty, they have neither alleged nor proved that there were any clear limits on the P&T Committee's decision with respect to Sayles' application for promotion or tenure such that she could not be denied promotion or tenure unless specific criteria were satisfied. Thus, Sayles cannot establish a property interest in her

application for promotion and tenure. See, e.g., Colburn, 973 F.2d at 589-90. Sayles complains about the procedures of the P&T Committee at all levels of decision-making and review. But, as explained, procedural interests under state law are not property rights enforceable under the federal Constitution. See Swartz, 964 F.2d at 610.fn17

As for the AF&E Committee's "decision against her," the Complaint does not allege, and the Plaintiffs have produced no evidence, that the Committee took any action affecting any alleged property interest of Sayles. Rather, the evidence is that the AF&E Committee decided not to take any action on the complaint Sayles filed against others. (See Worthen Aff., Ex. F. at 87-94, 172-75.) There is no authority for the proposition that Sayles had a property interest in that complaint. Similarly, the Plaintiffs have offered no evidence to support their claim that Sayles had a property interest in her sexual harassment complaints against others filed with the Affirmative Action Officer. Sayles' claims that she was denied procedural rights granted to subjects of complaints to the AF&E Committee are puzzling because there is no evidence that Sayles was the subject of a complaint to the Committee.

Absent a contractual provision limiting the University's right to reassign her, Sayles has no property interest in teaching any particular class. See Dorsett v. Board of Trustees for State Colleges & Univs., 940 F.2d 121, 123 (5th Cir. 1991); Wagner v. Texas A & M, 939 F. Supp. 1297, 1312 (S.D. Tex. 1996); Reyes-Pagan v. Benitez, 910 F. Supp. 38, 43 (D.P.R. 1995). In Dorsett, the plaintiff, a tenured professor, alleged claims under § 1983 and the First, Fifth, and Fourteenth Amendments. He claimed that his exercise of free speech on matters of public concern caused the faculty and staff to retaliate against him. The plaintiff had not been terminated or

threatened with termination. Dorsett, 940 F.2d at 123.

The Dorsett court affirmed the grant of summary judgment for the defendants, holding that the plaintiffs complaints about teaching assignments, administrative matters, and departmental procedures were insufficient to amount to a constitutional deprivation. Id. The court explained:

[t]he contihuing retaliatory actions alleged by [the plaintiff] appear to be nothing more than decisions concerning teaching assignments, pay increases, administrative matters, and departmental procedures. We recognize that such decisions might seem extremely significant to [the plaintiff] who has devoted his life to teaching. But we believe, nevertheless, that the alleged harms suffered by [the plaintiff] do not rise to the level of a constitutional deprivation.

Dorsett, 940 F.2d at 123. The court added:

> In public schools and universities across this nation, interfaculty disputes arise daily over teaching assignments, room assignments, administrative duties, classroom equipment, teacher recognition, and a host of other relatively trivial matters. A federal court is simply not the appropriate forum in which to seek redress for such harms.

Id.

The district courts in Wagner and Reyes-Pagan reached similar conclusions. The plaintiff Wagner brought a § 1983 claim, alleging a deprivation without due process of the benefits of his teaching position, including the particular

class he taught. He did not, however, claim a deprivation of any economic benefit such as his salary. Wagner, 939 F. Supp. at 1311. The court held that "[a]bsent a contractual provision limiting the University's right to reassign Wagner, he has no property interest in his teaching assignment, or in teaching classes at all." Id. at 1312. The Reyes-Pagan court similarly held that the plaintiff teacher failed to state a claim for a procedural due process violation under § 1983, finding no authority to support a claimed property interest in teaching a specific course. Reyes-Pagan, 910 F. Supp. at 43.

This court finds these authorities persuasive and, therefore, concludes that Sayles' removal from the classroom in November 1997 did not constitute a deprivation of a protectable property right. Sayles does not claim to have been terminated or deprived of economic compensation in connection with her removal from the classroom. She has not produced any written agreement between her and the University regarding the class she was teaching at the time of her removal. Nor has she attempted to prove any verbal agreement between her and the University regarding her assignment to teach that class, It is noted that the Plaintiffs have pointed to no authority to support Sayles' claim of a property interest in teaching the class she was teaching at the time of her removal in November 1997.

Moreover, the court concludes that Sayles had no property interest in her teaching duties for the spring 1998 semester. As with the right to teach a particular class, the Plaintiffs have offered no authority to establish that Sayles has a property interest in her teaching duties. Sayles' employment with the University was not terminated effective the spring 1998 semester, and there is nothing in the record to suggest that she suffered any economic deprivation because she was relieved of her teaching duties for the semester.

Following Wagner, absent an agreement limiting the University's right to reassign Sayles to another duty, Sayles has no property interest in her teaching duties for the spring 1998 semester. The record contains no evidence of any such agreement; therefore, the court concludes that Sayles' claim of a property interest in her teaching duties for the spring 1998 semester must fail.

Though the Plaintiffs claim that Wisner was denied a property right, they have not alleged nor proved any facts to support such a claim. Nor have they argued in their supplemental brief, which responds to the Defendants' motion for summary judgment on the due process claims, that Wisner was denied any property right. Had they argued that Wisner had a property right in her Administrative Assistant position with the Department of which she was deprived by her transfer, it would fail. As discussed below, the evidence establishes that Wisner receives the same pay and benefits and has similar duties in her new position as she did in her former position with the Department. Even if Wisner had a property interest in her Administrative Assistant position, her transfer to her new position did not deprive her of any property interest protected by the Fourteenth Amendment.

The court concludes that the Plaintiffs have failed to produce sufficient evidence upon which a rational trier of fact could find that they had any property interest protected by the Fourteenth Amendment.

b. Liberty Interests

A state employee has a liberty interest in not being discharged from his or her employment under certain circumstances. See Strasburger v. Board of Educ., Hardin

County Community Unit Sch. Dist. No. 1, 143 F.3d 351, 356 (7th Cir. 1998), cert. denied, 119 S. Ct. 800 (1999); Lashbrook v. Oerkfitz, 65 F.3d 1339, 1349 (7th Cir. 1995). To establish a deprivation of such a liberty interest, a plaintiff must show the following elements: (1) he was discharged from his employment, (2) "he was stigmatized by the defendant's conduct," Strasburger, 143 F.3d at 356, (3) "the stigmatizing information was publicly disclosed," id. and (4) "he suffered a tangible loss of other employment opportunities as a result of public disclosure." id. See also Harris v. City of Auburn, 27 F.3d 1284, 1286 (7th Cir. 1994).

Webb does not satisfy even the first element--he was not discharged from his employment. He therefore cannot establish a deprivation of a liberty interest.fn18 Even assuming that Webb's removal as Chair of the Department satisfies the first element, there is no evidence that his removal was accompanied by sufficiently stigmatizing conduct, which he must prove to prevail on a deprivation of liberty claim.fn19

To be sufficiently stigmatizing, the employee's "good name, reputation, honor, or integrity" must be implicated and "the circumstances of the termination must make it virtually impossible for the employee to find new employment in that field." Strasburger, 143 F.3d at 356; Lashbrook, 65 F.3d at 1348-49. Examples of sufficiently stigmatizing accusations are "such charges as immorality, dishonesty, alcoholism, disloyalty, Communism, or subversive acts." Lashbrook, 65 F.3d at 1348. A label of incompetence or inadequacy in performing one's job does not infringe one's liberty interest. See Lashbrook, 65 F.3d at 1348. At most, Webb's removal implicated that he was incompetent as Chair of the Department, but this is not sufficiently stigmatizing. There is nothing to suggest that the label of an incompetent department chair would render Webb unemployable as a

professor in criminal justice. Many good professors, like many good lawyers, simply are not good administrators. A failure at administrating does not necessarily reflect poorly on Webb's ability as a professor. Thus, the evidence is insufficient to support Webb's claimed deprivation of a liberty interest in his removal as Chair.

Sayles, like Webb, fails to present evidence to prove a claimed deprivation of a liberty interest in her employment. There is no evidence in the record before the court that she has been discharged from her employment with the University. The evidence presented at the preliminary injunction hearing establishes that she was removed from her teaching assignment, but not dismissed. (Tr., Vol. II. at 523-24.)20 Even assuming that the denial of her application for promotion and tenure amounts to a discharge from her employment, Sayles has produced no evidence whatsoever to satisfy the second, third and fourth elements under Strasburger. As for the fourth element, Sayles has not alleged (or proved) that she has sought other employment or that the denial of her application for promotion and tenure thwarted her efforts to obtain such employment.

In the Plaintiffs' Supplemental Memorandum, Sayles accuses Defendant Hendricks of spreading a rumor that an internship supervisor believed she was sexually involved with a student. (Supplemental Mem. at 7.) Though such a rumor may be "sufficiently stigmatizing," see Lyons v. Barrett, 851 F.2d 406, 410 (D.C. Cir. 1988), there is no evidence that the rumor accompanied any employment action against Sayles or that Sayles has suffered any tangible loss of other employment opportunities because of said rumor. Nor has Sayles established that she has first hand knowledge that Hendricks spread such a rumor about her. Consequently, she cannot prevail on a deprivation of liberty interest arising from

the alleged rumor. Sayles also claims that she and other Department faculty were accused by the AF&E Committee of filing grievances in "bad faith." (Supplemental Mem. at 7-8.) This claim fails to establish a deprivation of a liberty interest for the same reasons a claim premised upon the rumor fails. Further, there is no evidence that the AF&E Committee's accusation was publicly disclosed.

As for Wisner, the Plaintiffs' Supplemental Memorandum does not even attempt to argue that she was deprived of a liberty interest. More importantly, the Plaintiffs have not come forward with any evidence which would support such a claim by Wisner. If, however, Wisner claimed that her transfer from the Department deprived her of a liberty interest, her claim would fail. She cannot satisfy any of the four elements of a deprivation of a liberty interest claim set forth in Strasburger.

In short, the Plaintiffs have failed to present evidence sufficient to establish that any of them was deprived of a liberty interest protected by the Fourteenth Amendment. In an abundance of caution, the court considers whether the evidence would establish a violation of the Plaintiffs' substantive due process rights.

c. Substantive Due Process

To the extent the Plaintiffs allege violations of their substantive due process rights, their claims fail. Recently, both the Supreme Court and the Seventh Circuit have "emphasized. . . how limited the scope of the substantive due process doctrine is." Dunn v. Fairfield Community High Sch. Dist. No. 225, 158 F.3d 962, 964-66 (7th Cir. 1998) (citing

County of Sacramento v. Lewis, 523 U.S. 833, --- ---, 118 S. Ct. 1708, 1717-20(1998); Washington v. Glucksberg, 521 U.S. 702, ---, 117 S. Ct. 2258, 2267 (1997)). Relying upon Lewis, the court in Dunn explained that "[t]he touchstone of due process...is 'protection of the individual against arbitrary action of government,' whether the problem is the denial of fundamental procedural fairness or the exercise of governmental power without any reasonable justification." Dunn, 158 F.3d at 965 (quoting Lewis, 118 S. Ct. at 1716 --- (quotation omitted)). The court then stated, "[t]he criteria that govern what is fatally arbitrary in [substantive due process] cases depend upon whether legislation or a specific act of a governmental officer is at issue." Id.

When the focus is on the specific act of a governmental official (as opposed to legislation), "only the most egregious official conduct' is arbitrary in the constitutional sense." Id. (quoting Lewis, 118 S. Ct. at 1716). The "benchmark" for a substantive due process violation by a governmental official is "an abuse of power that 'shocks the conscience." Id. (citing Rochin v. California, 342 U.S. 165 (1952)). "Negligent conduct can virtually never meet the constitutional threshold. Instead, . . . 'conduct intended to injure in some way unjustifiable by any governmental interest' would be most likely to rise to the conscience-shocking level. Id. (emphasis in original) (quoting Lewis, 118 S. Ct. at 1718). Lewis held that the complaint failed to state a substantive due process claim when it alleged that a police officer's reckless behavior during the officer's high-speed pursuit of a motorcycle led to the death of the motorcycle's passenger.

When the focus of a substantive due process case is on legislation (as opposed to a specific act of a governmental official), the court must decide whether the legislation

interferes with "certain fundamental rights and liberty interests." Id. at 966 (quoting Glucksberg, 117 S. Ct. at 2267).fn21 In Glucksberg, the Court set out two "features" of this analysis:

> First, . . . the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Second, we have required in substantive-due-process cases a careful description of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial guideposts for responsible decision making that direct and restrain our exposition of the Due Process Clause.

Glucksberg, 117 S. Ct. at 2268 (citations and internal quotations omitted).

To the extent the Plaintiffs claim that their substantive due process rights were violated by a specific act of a Defendant, they must show there is a genuine issue of fact as to whether any act of a Defendant was "an abuse of power that 'shocks the conscience." Dunn, 158 F.3d at 965 (citation omitted). They have made no such showing. To the extent they claim that their substantive due process rights were violated by the procedures followed by a Defendant, they must show a genuine issue of fact as to whether those procedures were "wholly arbitrary." Dunn, 158 F.3d at 966. Again, they make no such showing. In addition, the Plaintiffs have not shown any interference with a fundamental right deserving of the protections of substantive due process.

Therefore, to the extent they are asserted, the Plaintiffs cannot prevail on any § 1983 claim premised upon a denial of substantive due process.

2. First Amendment Retaliation

The Plaintiffs also base their § 1983 claims on First Amendment retaliation. When a public employee asserts a First Amendment retaliation claim, the court must determine whether the speech was constitutionally protected. See Kokkinis v. Ivkovich, 185 F.3d 840, 843 (7th Cir. 1999); see also Connick v. Myers, 461 U.S. 138, 146 (1983); Colburn v. Trustees of Ind. Univ., 973 F.2d 581, 585 (7th Cir. 1992). If it is, then the plaintiff must demonstrate "that the protected speech caused, or at least played a substantial part in" the decision to take an adverse employment action against the employee. See Kokkinis, 185 F.3d at 843; see also Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

Whether the plaintiffs speech was constitutionally protected is a question of law for the court, requiring application of the Connick-Pickering test. See Connick, 461 U.S. at 148 n.7; Kokkinis, 185 F.3d at 843. First, the court must decide whether the plaintiffs speech addressed a matter of public concern. See Connick, 461 U.S. at 147-48; Kokkinis, 185 F.3d at 843. If it does, then the court must consider the Pickering balancing test under which it weighs the employee's First Amendment interests against the government's interest as employer. See Pickering v. Board of Educ. of Township High Sch. Dist., 391 U.S. 563, 568 (1968); Kokkinis, 185 F.3d at 844. This court need not conduct a Pickering balancing test because the Plaintiffs have not demonstrated that their speech addressed a matter of

public concern.

Speech addresses a matter of public concern if it relates to any matter of political, social or other concern to the community. See Connick, 461 U.S. at 146; Khuans v. School Dist. 110, 123 F.3d 1010, 1014-15 (7th Cir. 1997). The issue of sexual harassment in a public school is a matter of public concern. See Callaway v. Hafeman, 832 F.2d 414, 417 (7th Cir. 1987). However, "speaking up on a topic that may be deemed one of public importance does not automatically mean the employee's statements address a matter of public concern." Kokkinis, slip op. at 6 (holding that employee's speech on sex discrimination did not address matter of public concern). Instead, the court considers "the content, form, and context of [the] statement, as revealed by the record as a whole." Connick, 461 U.S. at 147-48; see also Button v. Kibby-Brown, 146 F.3d 526, 529-30 (7th Cir. 1998). Of these three, content is the most important. See, e.g., Button, 146 F.3d at 529. The court must consider:

> "the point of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?"

Kokkinis, 185 F.3d at 844 (quoting Callaway, 832 F.2d at 417) (internal quotation omitted).

If consideration of content, context and form indicates that an employee raised a matter of public concern for "personal reasons rather than a desire to air the merits of the issue. . . or solely to bolster [his] own position in a private

personnel dispute with [his] superiors... then the speech is not protected by the First Amendment." Button, 146 F.3d at 530 (quotations omitted); Connick, 461 U.S. at 147. Thus, the employee's motive in the particular speech is a relevant consideration, see Button, 146 F.3d at 529; though not dispositive. See id.; Cliff v. Board of Sch. Comm'rs of Indianapolis, 42 F.3d 403, 409 (7th Cir. 1994). In considering motive, the court must decide whether the employee was speaking "more like a citizen or a disgruntled employee whose statements are primarily of personal interest." Colburn, 973 F.2d at 585; see also Button, 146 F.3d at 530.

In opposing the Defendants' motion, the Plaintiffs rely on the following "speech":

Webb's speech in reporting allegations of sexual harassment of students by two faculty in the Department (Meagher and Cotlar), opposition thereto, and complaints about the University's response, as well as Sayles' and Wisner's acts in support of Webb's opposition to the alleged sexual harassment. The Plaintiffs do not rely on other speech alleged in their Complaint such as Webb's claim that he reported malfeasance and nonfeasance of certain Department employees, (Compl. ¶ 29), Sayles' report to Defendant Ho that he had engaged in "unprofessional behavior," (id. ¶ 44(D)), Sayles' involvement in the American Association of University Professors, (Id. ¶[ 44(K)), her efforts to organize a coalition of university unions and associations, (id. ¶ 44(L)), the Plaintiffs' filing of an action in state court, (id. ¶ 35), or their filing of EEOC Charges of Discrimination. (Id. ¶¶ 36, 46, 49(G), 51). The court deems the failure to argue that this other speech addressed a matter of public concern as a waiver of such an argument. Further, the Plaintiffs have not directed the court's attention to any evidence in the record which would support a claim that this other speech addressed matters of public concern. Therefore, the court understands

the Plaintiffs to contend that only their speech with respect to reporting and opposing the allegations of sexual harassment of students by Meagher and Cotlar and complaints about the University's response were on matters of public concern.

Upon considering the content, form and context of this speech, the court determines that it did not address a matter of public concern. These three factors indicate that Webb raised the matter of the alleged sexual harassment and the University's response to his complaints not because they were matters of public concern but for personal reasons and to improve his own position in a private departmental dispute with his superiors, the Dean and the Provost. Webb was the Chair of the Department, the alleged harassers were faculty in his Department, and Webb reported the alleged harassment in his role as Chair of the Department. Webb wanted Meagher and Cotlar discharged—not only for their alleged harassment but also for other unrelated reasons. (See Webb Aff. ¶ 3 (mentioning "Cotlar's misconduct, his refusal to make himself reasonably available to students..., . ., his refusal to teach his class, his attacks upon me and his colleagues in the Department, and his sexual pressuring of one of his students"); Worthen Aff., Ex. F at 18 (noting Meagher's unsatisfactory progress toward tenure)).

In addition, Webb's report of sexual harassment was limited to the actions of two faculty members; he was not speaking out on departmental or university-wide sexual

harassment. He complained about matters of interest only to the Department or the University; he did not complain of matters that would directly affect the community at large. The Plaintiffs have not demonstrated that in complaining about the alleged sexual harassment and the University's

response, Webb was motivated by anything other than his previous desire to have Cotlar and Meagher's employment terminated (on the basis of other failures) or his desire to improve his position in his conflict with the Dean and Provost. Thus, he was speaking more like a disgruntled Chair of the Department and an employee of the University rather than as a concerned citizen.

Webb's speech must be viewed in its context--in the midst of a conflict over internal university affairs between Webb and the Department on the one hand and the Dean and Provost on the other. The Plaintiffs' own affidavits establish the existence of this internal conflict.fn22 Webb's manifesto to the Board of Trustees of June 30, 1995, sheds additional light on Webb's conflict and power struggle with the Dean and Provost. (Worthen Aff., Ex. F.) The majority of the 225-page manifesto addresses Webb's perceived lack of support from the administration. (See, e.g., Id. at 16 (complaining of the Department's problems with the Provost), 222 (accusing Richards, Vander Hill and Johnstone of a "malicious attack against the Department in general and [Webb] in particular" and claiming the Dean and Provost supported and rewarded Cotlar), 223 (claiming the Dean and Provost have maligned the faculty in the Department and damaged the Department by reducing the number of tenure-line faculty; perceiving the support of Cotlar as harassment of faculty within the Department), and 224 ("The Office of the Dean... . . is... .. committed to damaging this Department generally and me in particular"). Only approximately nine pages of the manifesto concern Meagher (Id. at 16-25.) The manifesto expresses Webb's disagreement with the Provost over whether Meagher's conduct amounted to sexual harassment. Of the first 135 pages devoted to Cotlar, the matters raised therein concern his performance as faculty member--his barely satisfactory review in the area of service, his refusal to teach his schedule classes, his failure to attend meetings and

provide office hours, and his rudeness and hostility toward other faculty--rather than alleged sexual harassment. (See Webb Aff. ¶3; Worthen Aff., Ex. 1(F) at 26-162.) Only after discussing these other matters does Webb raise Cotlar's alleged sexual harassment. (Id. at 163.)

The thrust of Webb's manifesto to the Board is the lack of support he and the Department were given by the administration, particularly the Dean and Provost. Webb's authority within the Department and as against the Dean and Provost is a matter of concern personal and private to Webb. Likewise, the amount of support or lack thereof given the Department by the Dean and Provost is a private rather than public matter. As with the complaints in Colbum, Webb's speech was made in the context of a faculty/administration feud. See Colbum, 973 F.2d at 582-86 (feud within the sociology department).fn23

The form of the Webb's speech supports the conclusion that it did not address a matter of public concern. Employee speech does not go unprotected simply because the chosen forum is private and addressed solely to others in the workplace. See Givhan v. Western Line Consolid. Sch. Dist., 439 U.S. 410, 415-16 (1979); Wright v. Illinois Dep't of Children & Family Servs., 40 F.3d 1492, 1501-02 (7th Cir. 1994). But the decision to deliver the speech in private supports the inference that the speech is of a private employment concern rather than public concern. See Button, 146 F.3d at 531 (form and context supported conclusion that speech was not on matter of public concern where it was made in private, informal setting and only to the person the plaintiff believed could overturn the decision about which he complained); Phares v. Gustafsson, 856 F.2d 1003, 1008-09 (7th Cir. 1988) (plaintiff aired complaints through the university's grievance procedures and did not try to expose or inform the public of wrongdoing within the university).24

The Seventh Circuit has said:

> [W]here considerations of motive and context indicate that an employee's speech raised a topic of general societal interest merely for 'personal reasons rather than a desire to air the merits of the issue. . . or for the sole purpose of 'bolster[ing] [his] own position in a private personnel dispute with [his] superiors,... . . . [the decision to communicate in private] militate[s] against the conclusion that the employee's speech is entitled to First Amendment protection.

Campbell v. Towse, 99 F.3d 820, 827 (7th Cir. 1996), cert. denied, 520 U.S. 1120 (1997) (quotations omitted).

Webb's speech took the form of internal memoranda or correspondence or was expressed in internal meetings rather than in a public forum. He did not seek to expose the alleged sexual harassment or the University's response to the public.25 Instead, he expressed his speech to persons he believed could take action on his complaints of harassment and complaints of an inadequate response, for example, Defendant Richards and the Board. As explained, the context in which Webb's speech was made and his motive suggest that his speech about sexual harassment and the University's response to his complaints was made for personal reasons and in an effort to improve his own position and that of the Department in a private dispute with the Dean and Provost. Thus, the communication of his speech in a private forum militates against a conclusion that his speech is constitutionally protected. See Campbell, 99 F.3d at 827.

The Plaintiffs have not come forward with sufficient

evidence to support an inference that either Sayles or Wisner engaged in protected speech. Their "speech" consisted of their acts in support of Webb's reporting of and opposition to the alleged sexual harassment by Meagher and Cotlar, complaints about the University's response to the alleged harassment, and complaints of discrimination and harassment against themselves. Sayles's claims of First Amendment protection fail for the same reasons Webb's claim fails. Her speech was not on a matter of public concern. Her speech was raised in the context of Webb's and the Department's conflict with the Dean and Provost. In addition, it was communicated privately rather than through public channels. Wisner's First Amendment retaliation claim fails for these same reasons as well.

In short, the Plaintiffs have not produced evidence sufficient to demonstrate that their speech addressed a matter of public concern, which they must do in order to establish a First Amendment retaliation claim.

C. § 1983 Conspiracy Claims

To demonstrate a prima facie case of a civil conspiracy under § 1983, a plaintiff must prove: (1) that the defendants agreed to deprive him or her of constitutionally protected rights, and (2) an actual deprivation of those rights. Scherer v. Balkema, 840 F.2d 437, 442 (7th Cir. 1988). Because the Plaintiffs have not come forward with sufficient evidence to prove any deprivation of their constitutional rights, they cannot establish a prima facie case of civil conspiracy. Accordingly, the Defendants' motion for summary judgment should be GRANTED as to the § 1983 civil conspiracy claims asserted in Counts IV, VIII and XII.

D. Claims Against Defendant Aldridge

The Defendants argue that Counts III, IV, VII and VIII--Webb and Sayles' civil rights and conspiracy claims--fail to state claims against Defendant Aidridge for a variety of reasons. The court agrees.fn26

The Plaintiffs concede that Defendant Aldridge's acts did not directly affect Plaintiff Sayles and move to voluntarily dismiss Aldridge from Counts VII and VIII. The court has indicated that it would treat the Defendants' Motion to Dismiss as a motion for summary judgment. Therefore, the court understands the Plaintiffs' to concede that Defendant Aldridge is entitled to summary judgment in his favor rather than mere dismissal. Accordingly, the Defendants' Motion to Dismiss is GRANTED with respect to the claims against Defendant Aldridge in Counts VII and VIII and summary judgment will be granted Defendant Aldridge on these counts.

"Not every legally cognizable injury inflicted by a state [actor] acting under color of law violates the Fourteenth Amendment." Hill v. Shobe, 93 F.3d 418, 421 (7th Cir. 1996) (citing Paul v. Davis, 424 U.S. 693, 699 (1976)). In Paul v. Davis. the Supreme Court held that one's reputation alone, apart from a tangible interest such as employment, is not a property or liberty interest entitled to due process protection.

Paul, 424 U.S. at 701; see also Robbins v. Bentsen, 41 F.3d 1195, 1200 (7th Cir. 1994) (observing that "the Constitution does not protect individuals against mere defamation"). The Court wrote:

The words "liberty" and "property" as used in the

> Fourteenth Amendment do not in terms single out reputation as a candidate for special protection over and above other interests that may be protected by state law. While we have in a number of our prior cases pointed out the frequently drastic effect of the "stigma" which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either "liberty" or "property" by itself sufficient to invoke the procedural protection of the Due Process Clause..[W]e think that the weight of our decisions establishes no constitutional doctrine converting every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.

Paul v. Davis, 424 U.S. at 701-02 (footnote omitted).

In addition to the allegation identifying Defendant Aldridge as a BSU student and reporter for the student newspaper, the Complaint contains only one factual allegation relating to this Defendant:

> [O]n or abou. March 24, 1997, defendant ALDRIDGE, chief reporter for the BSU Daily News, the student newspaper, wrote an article falsely implying and/or accusing plaintiff WEBB of having been found guilty of sexual harassment of members of his department faculty, when in fact the actual event being reported by defendant ALDRIDGE was the BOARD'S discussion of plaintiff WEBB'S reporting of such conduct on the part of others on his faculty.

> Defendant ALDRIDGE wrote the aforementioned article with reckless disregard of the truth or falsity of the allegations made against plaintiff WEBB at a time when another reporter from the Daily News had in his possession documents refuting such implication and/or accusation, all of which caused plaintiff WEBB injury to his reputation and mental distress;....

(Compl. ¶ 35(H)). It is alleged that Defendant Aldridge deprived Webb of property and liberty in violation of the Fourteenth Amendment's Due Process Clause and the First Amendment. (Compl., Count III ¶ 39 and Count IV ¶ 39)fn27

However, the Complaint merely alleges that Defendant Aldridge defamed Webb and that as a result, Webb suffered an injury to his reputation and mental distress. The Complaint does not allege that the injury to Webb's reputation accompanied a deprivation of any tangible interest such as employment. Moreover, as the court previously has determined, the Plaintiffs have not come forward with sufficient evidence to establish that Webb was deprived of any property or liberty interest protected by due process. Injury to Webb's reputation, alone, is insufficient to constitute a deprivation of a property or liberty interest entitled to due process protections.

Because Webb has not demonstrated that Defendant Aldridge deprived Webb of an interest secured by the Constitution or federal laws, he cannot prevail on his § 1983 claim against Aldridge. See Graham v. Connor, 490 U.S. 386, 393 (1989). Therefore, Defendant Aldridge will be GRANTED summary judgment on Webb's § 1983 claim (Count III). Furthermore, because an actual deprivation of constitutionally or federally

protected rights is an essential element of a § 1983 civil conspiracy claim, see Scherer v. Balkema, 840 F.2d 437, 442 (7th Cir. 1988), Aldridge will be GRANTED summary judgment on Webb's § 1983 conspiracy claim (Count IV).

## VII.DEFENDANTS' FIRST MOTION FOR PARTIAL SUMMARY JUDGMENT

In their First Motion for Partial Summary Judgment, the Defendants advance several arguments as to why summary judgment should be granted them on Counts III, IV, VII, VIII, XI and XII.fn28 Because the court already has determined that the Defendants are entitled to summary judgment on these counts, it need not reach these additional arguments advanced by the motion for partial summary judgment.

It is noted, however, that in response to this motion, the Plaintiffs state: "Plaintiff (sic) hereby move for voluntary dismissal of defendant William McCune from plaintiff Webb's Counts III and IV and plaintiff Sayles' Count (sic) VII and VIII." (Pls.' Supplemental Response to Defs.' Mots. to Dismiss and For Summ. J. and Mem. In Supp. at 14.) As the Plaintiffs acknowledge, before they filed their Supplemental Response, the court indicated that it would treat the Defendants' Motion to Dismiss as a Motion for Summary Judgment. (See Id. at 2.) Thus, the attempt to voluntarily dismiss Defendant McCune comes too late, and the court understands the Plaintiffs to concede that summary judgment should be granted Defendant McCune as to Counts III, IV, VII and VIII. Accordingly, the court will GRANT the Defendants' First Motion for Partial Summary Judgment with respect to the claims against Defendant McCune asserted in Counts III, IV, VII and VIII of the Complaint.fn29

## VIII. DEFENDANTS' SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT

The Defendant Ball State moves for summary judgment as to Counts I, II, V, VI, IX, and X of the Complaint, which allege that the Board violated the Plaintiffs' rights under Title VII.

### A. Legal Standards

#### 1. Scope of EEOC Charge

A plaintiff cannot bring Title VII claims that were not included in his or her EEOC Charge. See Cheek v. Western & Southern Life Ins. Co., 31 F.3d 497, 500 (7th Cir. 1994); Rush v. McDonald's Corp., 966 F.2d 1104, 1110 (7th Cii. 1992); Babrocky v. Jewel Food Co., 773 F.2d 857, 863 (7th Cir. 1985). "This rule serves the dual purpose of affording the EEOC and the employer an opportunity to settle the dispute through conference, conciliation, and persuasion." Cheek, 31 F.3d at 500. Though not jurisdictional, this rule is a condition precedent with which a plaintiff must comply. See Cheek, 31 F.3d at 500.

The test for determining whether an EEOC Charge includes claims in a complaint was set forth in Jenkins v. Blue Cross Mutual Hospital Insurance, Incorporated, 538 F.2d 164 (7th Cir. 1976) (en banc): "all Title VII claims set forth in a complaint are cognizable that are 'like or reasonably related to the allegations of the charge and growing out of such allegations." Id. at 167 (quotations

omitted); see also Rush, 966 F.2d at 1110. Thus, there must be a reasonable relationship between the allegations in the charge and the claims in the complaint. At a minimum, the charge and the complaint must 'describe the same conduct and implicate the same individuals." Cheek, 31 F.3d at 501 (emphasis in original); see also Rush, 966 F.2d at 1110. Moreover, the alleged conduct must be described with some degree of specificity. See Cheek, 31 F.3d at 502; Rush, 966 F.2d at 1111 ("the requirement of some specificity in a charge is not a 'mere technicality"); see also Jansen v. Packaging Corp. of Am., 123 F.3d 490, 493 (7th Cir. 1997) (holding that retaliatory acts outside the scope of an EEOC charge are waived), aff'd sub nom. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

2. Title VII Retaliation

It is an unlawful employment practice for an employer to discriminate against an employee because he or she opposed any unlawful employment practice or participated in any charge or investigation under Title VII. 42 U.S.C. § 2000e-3(a); see also Essex v. United Parcel Serv., Inc., 111 F.3d 1304, 1308 n.4 (7th Cir. 1997). To establish a prima facie case of retaliation in violation of Title VII, a plaintiff must demonstrate that: (1) he or she engaged in statutorily protected activity, (2) he or she suffered an adverse employment action, and (3) there was a causal connection between the two. See, e.g., Filipovic v. K & R Exp. Sys., Inc., 176 F.3d 390, 398 (7th Cir. 1999); Essex, 111 F.3d at 1309.

Under the burden-shifting method established by McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973) (which is the method of proof used in this case), once

a plaintiff establishes a prima facie case of retaliation, then the defendant must proffer a legitimate, non-discriminatory reason for the challenged action. Id. at 802-03. If the defendant discharges this burden of production, then the burden shifts back to the plaintiff to demonstrate that the proffered reason was a pretext for retaliation. See, e.g., Wilson v. Chrysler Corp., 172 F.3d 500, 504 (7th Cir. 1999); Parkins v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1038 (7th Cir. 1998).

a. Statutorily Protected Activity

The Defendants argue with respect to each Plaintiffs retaliation claim that the Plaintiffs first EEOC charge fails to state a claim for retaliation because the alleged sexual harassment of Cotlar and Meagher was not conduct unlawful under Title VII and, therefore, the reporting of the alleged harassment was not protected activity. The Defendants cite a decision from the Ninth Circuit and a decision of the Northern District of Alabama for the proposition that the conduct complained of must be a violation of Title VII. It is well-established in the Seventh Circuit, however, that "[a]n actual violation of Title VII by the employer is not a prerequisite for a retaliation claim; the employee need only have a sincere and reasonable belief that she is challenging conduct that violates Title VII." Hunt-Golliday v. Metropolitan Water Reclamation Dist. of Greater Chicago, 104 F.3d 1004, 1014 (7th Cir. 1997) (citing Holland v. Jefferson Nat'l Life Ins. Co., 883 F.2d 1307, 1314 (7th Cir. 1989)).

Because this court must follow Seventh Circuit precedent, the Plaintiffs need not allege or prove that the challenged conduct was an actual violation of Title VII.

Instead, they need only establish they had a sincere and reasonable belief that the conduct they challenged violated Title VII. The Defendants have not challenged whether the Plaintiffs had sincere and reasonable beliefs that the conduct they were opposing violated Title VII; therefore, the court will presume for purposes of summary judgment that the Plaintiffs held such beliefs.

b. Adverse Action

An adverse employment action is not limited solely to a loss or reduction of pay or monetary benefits. See, e.g., Smart v. Ball State Univ., 89 F.3d 437, 441 (7th Cir. 1996). In Crady v. Liberty National Bank & Trust Company, 993 F.2d 132 (7th Cir. 1993), the Seventh Circuit explained what constitutes a materially adverse employment action:

> [A] materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

Id. at 136; see also Fortier v. Ameritech Mobile Comm., Inc., 161 F.3d 1106, 1111-12 n.7 (7th Cir. 1998) (quoting Crady, 993 F.2d at 136). "[N]ot everything that makes an employee unhappy is an actionable adverse action. Otherwise, minor and even trivial employment actions that

'an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit." Smart, 89 F.3d at 441 (quoting Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996)).

c. Causal Connection

"A close temporal connection between the two events 'is generally enough to satisfy the third element of the prima facie test.' However, 'as the temporal distance between [the claimant's] protected expression and the adverse action increase[s], it is less likely that there is a causal link between the two events." McClendon v. Indiana Sugars, Inc., 108 F.3d 789, 796-97 (7th Cir. 1997) (citations omitted). The Seventh Circuit has found the inference of the necessary causal link sufficiently demonstrated when the time period between the protected activity and the retaliatory action was one day, see Johnson v. Sullivan, 945 F.2d 976, 980 (7th Cir. 1991); two to three days, see McClendon, 108 F.3d at 797; and one week. See Holland v. Jefferson Nat'l Life Ins. Co., 883 F.2d 1307, 1314-15 (7th Cir. 1989). In contrast, the Seventh Circuit has found the temporal proximity alone insufficient to suggest the causal link when the time period was almost one year, see Mckenzie v. Illinois Dep't of Transp., 92 F.3d 473, 485 (7th Cir. 1996); nearly six months, see Juarez v. Ameritech Mobile Communications, Inc., 957 F.2d 317, 321 (7th Cir. 1992); five months, see Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, 511(7th Cir. 1998); four months, see Hughes v. Deiwinski, 967 F.2d 1168, 1174-75 (7th Cir. 1992); and just over three and a half months. See Jasmantas v. Subaru-Isuzu Automotive, Inc., 139 F.3d 1155, 1157 (7th Cir. 1998). These cases do not establish a bright line test for determining when temporal proximity alone suggests a causal link. They do, however, guide the court's determination of whether temporal proximity alone is sufficient to establish

the requisite causal link.

d. Pretext

Pretext has been explained as follows:

> [T]he employee has the burden of showing that the employer's reason for the [adverse action] was a lie (see Russell v. Acme-Evans Co., 51 F.3d 64, 68 (7th Cir. 1995)) or had no basis in fact (see Johnson v. City of Fort Wayne, 91 F.3d 922, 931 (7th Cir. 1996)). It is not sufficient to prove that the reason was doubtful or mistaken. See Russell, 51 F.3d at 68 (explaining that "pretext" does not mean simply a "mistake," but rather "a lie, specifically a phony reason for some action"). Even if the... reasons for [the adverse actions] were mistaken, ill-considered or foolish, if the [defendant] honestly believed in those reasons then pretext has not been proven. See Brill v. Lante Coip., 119 F.3d 1266, 1270 (7th Cir. 1997); Pollard v. Rea Magnet Wire Co., 824 F.2d 557, 559 (7th Cir.), cert. denied, 484 U.S. 977, 108 S.Ct. 488, 98 L.Ed.2d 486 (1987).

Crim v. Board of Educ. of Cairo Sch. Dist. No. 1, 147 F.3d 535, 541 (7th Cir. 1998); see also Sweeney v. West, 149 F.3d 550, 557 (7th Cir. 1998) (stating a plaintiff "must call the employer's honesty into question by rebutting the reason given").

B. Count I - Webb's Sexual Harassment Claim

As to Count I, the Defendants contend that Webb's

sex discrimination claim is beyond the scope of his EEOC Charges. The court agrees.

Count I is entitled "Plaintiff Webb's Cause of Action for Sexual Harassment" and asserts that Webb was subjected to sexual harassment. The sex discrimination box is checked on Webb's first EEOC charge, but the body of the charge contains no allegations pertaining to a sex discrimination or harassment claim. The Seventh Circuit has not addressed whether merely checking the box on the charge form without making particular allegations in the body of the charge suffices to include a claim within the scope of the EEOC charge. It has concluded, however, that a retaliation claim exceeded the scope of the charge where the retaliation box was not checked on the charge and the body of the charge contained no allegations pertaining to a retaliation claim. See Auston v. Schubnell, 116 F.3d 251, 254 (7th Cir. 1997). Yet, "[w]hat boxes.

> are checked on the EEOC [charge] do not necessarily control the scope of a subsequent civil complaint[.]" Kristufeck v. Hussman Foodservice Co., Toastmaster Div., 985 F.2d 364, 368 (7th Cir. 1993).

The court concludes that checking the box for "sex" discrimination alone does not suffice to bring a sexual harassment claim within the scope of the EEOC charge. In reaching this conclusion, the court is in agreement with the recent decision of Magistrate Judge Schenkier in Mohan v. AT&T Co., No. 97 C 7067, 1999 WL 495113, at *10 (N.D. Ill. June 30, 1999). In Mohan, the plaintiff checked the boxes for "Race" and "Unequal pay" on the EEOC charge but did not allege any particulars of race discrimination in the body of the charge. Id. at 8, 9, 10. In finding that merely checking the "Race" box was insufficient to include a race

discrimination claim within the scope of the charge, the court reasoned:

> [C]hecking a box on the EEOC charge form indicating that the cause of action is based on race and unequal pay may, under the most liberal of standards, "describe the same conduct" alleged in the complaint, but it certainly does not provide a basis for determining whether the same individuals were involved in such conduct, since there are no factual allegations regarding race in the narrative portion of the charge. Moreover, the Court finds that mere checkmarks do not describe any conduct, let alone the same conduct; thus,... . the Court cannot find that plaintiff has met the Jenkins test.

Id. at 10. This court agrees and adopts this reasoning here. Merely checking a box does not satisfy the Jenkins test. Merely checking the box fails to serve the purpose of affording the EEOC and the employer an opportunity to resolve the dispute.

Webb's first EEOC charge alleges that he was retaliated against by, inter alia, being "harassed," but there is nothing in the charge which would tend to suggest that Webb was complaining of a sexually hostile environment. Thus, a sexual harassment claim cannot be reasonably inferred from Webb's first EEOC charge. See Cheek, 31 F.3d at 503 (rejecting plaintiff's claim that allegations in EEOC affidavit that manager treated her in a hostile manner where nothing in the charge or affidavit suggested she was complaining of a sexually hostile environment). In addition, there is nothing in the record to suggest that a sexual harassment claim would grow out of the allegations in the first EEOC charge.

The Plaintiffs argue that EEOC intake officers rather than they drafted the EEOC charges, implying that this should entitle them to an exception to the rule regarding the scope of an EEOC charge. They have not, however, cited any authority creating such an exception. It is noted that each of the Plaintiffs signed each of their EEOC charges, thus indicating that they had an opportunity to review the charges before signing them. Had a charge been incomplete or failed to make a particular allegation, nothing prevented the Plaintiffs from correcting that charge. The Plaintiffs are well-educated people: Both Webb and Sayles have a Ph.Ds and Wisner is a college graduate. Thus, it can be presumed they were able to read and understand whether their EEOC charges were complete and said what they wanted them to say. In addition, the Plaintiffs assisted each other in preparing their EEOC charges. If one of them inadvertently failed to include a claim or allegation in a charge, the others likely would have caught the omission. Therefore, the court concludes that Webb's sexual harassment claim in Count I is beyond the scope of his first EEOC charge.

Webb's second and third EEOC charges fare no better: They do not include any allegations of sexual harassment, or for that matter, sex discrimination. A claim of sexual harassment cannot be reasonably inferred from anything alleged in Webb's second or third EEOC charges. Because a sexual harassment claim was not included in any of Webb's EEOC charges, he cannot assert such a claim in his complaint. Thus, the Defendants motion for summary judgment should be granted as to Webb's sexual harassment claim in Count I.

Even if Webb's sexual harassment claim was

included in one of his EEOC charges, the Defendants would still be entitled to summary judgment on that claim. The Defendants contend that Count I does not allege harassment or discrimination based on sex. The court agrees. Huebschen v. Department of Health and Social Services, 716 F.2d 1167 (7th Cir. 1983), guides this court's decision. In Huebschen, the plaintiff and his supervisor engaged in a consensual romantic relationship. After it ended, the supervisor recommended that the plaintiff be demoted at the end of his probationary period. Id. at 1169. The plaintiff brought an equal protection claim alleging sexual harassment by his supervisor. Id. at 1168. The court concluded that the supervisor's motivation in recommending the plaintiffs demotion was not the plaintiffs gender, but because he was a former lover who had jilted her. In addition, the court found no evidence that the supervisor had discriminated against or attempted to have romances with other men in the office. Id. at 1172. The Seventh Circuit held that the evidence demonstrated that the supervisor discriminated against the plaintiff as an individual rather than because of his gender. Id.; see also Trautvetter v. Quick, 916 F.2d 1140 (7th Cir. 1990); King v. Board of Regents of Univ. of Wis. Sys., 898 F.2d 533 (7th Cir. 1990).

Count I alleges that in responding to Webb's complaints of sexual harassment by others in the Department, Richards and other administrators were motivated by Webb's refusal to restore his relationship with Richards. (Compl. Count I ¶ 40-41.) As in Huebschen, Trautvetter, and King, Webb has not demonstrated that any alleged sexual harassment was because of his gender. Instead, the Complaint alleges, and the record supports, a finding that the harassment alleged in Count I was motivated by Webb's refusal to restore a consensual romantic relationship with Richards. There is no allegation or evidence that Richards or the other administrators (the Board, its members, Worthen, Vander

Hill, or Johnstone) discriminated against or harassed other men at the University. Webb's gender is, as the Defendants contend, "merely a circumstance."

The Plaintiffs have not proven or even alleged that the motivation of Richards and the other administrators in responding to Webb's complaints was Webb's gender. Thus, Count I fails to allege and the Plaintiffs have not proven that Webb was subjected to harassment because of his gender in violation of Title VII. This is yet another reason why the Defendants should be granted summary judgment on Count I of the Complaint.fn30 Accordingly, the Defendants' motion for summary judgment will be GRANTED as to Count I.

C. Count II - Webb's Title VII Retaliation Claim

As to Count II, Webb's retaliation claim, Ball State contends that (1) Webb's first EEOC charge fails to state a claim for retaliation; (2) his second and third EEOC charges do not allege adverse action; (3) Webb fails to allege facts that Ball State was motivated to retaliate against him because of his protected activity under Title VII; (4) his third EEOC charge fails to state a claim; and (4) the University had legitimate, non discriminatory reasons for removing Webb as Chairperson of the Department.

The Defendants contend that Webb's first EEOC charge, filed September 21, 1995, fails to state a claim for retaliation because it does not allege that Webb was engaged in statutorily protected activity prior to filing the charge. Though the court agrees with the Defendants that the first numbered paragraph in the body of the charge fails to allege that Webb had engaged in protected activity,fn31 it disagrees with respect tc the second numbered paragraph. Thus, to the

extent that Webb claims he was retaliated against for ending the consensual affair with Richards, his Title VII retaliation claim fails.

The second paragraph of the EEOC charge states that Webb believes he was retaliated against "for protesting something unlawful under Title VII," (Compl., Ex. 1), are apparent reference to Webb's complaints to the University about the alleged sexual harassment of two students by faculty members Cotlar and Meagher. The Defendants claim that Webb's complaints were not protected activity because Cotlar and Meag her' conduct did not violate Title VII. As stated previously, however, a Title VII plaintiff need only have a sincere and reasonable belief that the conduct he or she is opposing violates Title VII. The Defendants do not argue that Webb did not believe that Cotlar and Meagher's conduct violated Title VII or that Webb's belief was neither sincerely nor reasonably held. Thus, the court concludes, for purposes of the pending motions, that in protesting Cotlar and Meagher's alleged sexual harassment, Webb engaged in statutorily protected activity.

The Defendants argue, citing Rush v. McDonald's Corporation, 966 F.2d 1104 (7th Cir. 1992), that Webb's bare allegation that he was "protesting something unlawful under Title VII" is insufficient to support an EEOC charge or subsequent judicial complaint. Rush requires some specificity in the factual allegations giving rise to a claim asserted in an EEOC charge in order to preserve that particular claim for a complaint. Id. at 1111-12. The court does not understand Rush to require specificity with regard to the alleged statutorily protected activity but as to the alleged retaliatory acts. See id. at 1111 (noting that "the question of congruence arises because the charge was fairly detailed and the subsequent complaint deviated from the specific instances of

discrimination") (emphasis added). Thus, the court disagrees that Webb's first EEOC charge is insufficient on this basis to support Webb's retaliation claim in his Complaint.

With respect to Webb's second EEOC charge of retaliation, filed February 26, 1997, the Defendants contend it fails to allege a sufficiently adverse employment action. Webb's second charge alleges that he has been retaliated against because he filed a prior EEOC charge, which was filed on September21, 1995. (Compl., Ex. 2 at 1-2.)fn32 In response, Webb first argues that he did not draft the EEOC charge. He also argues that each act individually might or might not constitute an adverse action, but when taken as a whole, all the acts "obviously do." (PIs.' Resp. to Defs.' Mots. to Dismiss and for Summ. J. at 38.) The court has previously rejected the Plaintiffs' pleas for an exception to the scope of the charge rule.

The Plaintiffs maintain that even if each act alleged in Webb's second EEOC charge does not constitute an adverse action, all of the acts "taken as a whole" constitute an adverse action against him. (Pls.' Response to Defs.' Mot to Dismiss and for Summ. J. at 38.) They have not, however, presented any authority to support their claim that the types of acts about which Webb complains, when considered as a whole, rise to the level of a materially adverse employment action. Even when considered as a whole, the acts about which Webb complains are mere inconveniences rather than materially adverse actions. Webb's employment was not terminated. He was not demoted or given a less distinguished title or significantly diminished material responsibilities, with the possible exception of his removal as Chair which is discussed supra. Nor did he suffer any material loss of benefits or a reduction in his salary. Instead, the acts about which he complains, even when viewed as a whole, are

nothing more than minor and even trivial actions. Some of them--the 2 parking tickets and the 5 anonymous letters--could not be said to be employment actions at all.fn33

Even assuming that all the alleged retaliatory acts against Webb when viewed as a whole constitute a materially adverse employment action, Webb's retaliation claim fails for another reason. Webb has not come forward with sufficient evidence to create a genuine issue of material fact regarding the third element of the prima facie case of retaliation--that there is a causal connection between the protected activity and these employment actions. Webb's second charge alleges retaliation against him because he filed an EEOC charge on September 21, 1995. (Compl., Ex. 2 at 1-2.) He maintains that the time period between the filing of his EEOC charge and the retaliatory acts establishes the requisite causal link. (Pls.' Resp. Defs.' Mots. to Dismiss and for Summ. J. at 39.)

The adverse actions alleged in Webb's second EEOC charge occurred at the earliest in December 1996 (the parking tickets). The remaining alleged adverse actions occurred in February 1997 or thereafter. Thus, over 14 months lapsed between the time Webb filed his first EEOC charge and his receipt of the parking tickets, and more than 16 months passed before the occurrence of the other allegedly adverse actions. The passage of such an extensive length of time between the protected activity and the allegedly adverse actions is substantially greater than any period of time which the Seventh Circuit has held sufficient in and of itself to support an inference of causation. See Johnson, 945 F.2d at 980 (one day); McClendon, 108 F.3d at 797 (two to three days); Holland, 883 F.2d at 1314-15 (one week). The court concludes that the timing of the alleged adverse actions alone is insufficient to create a reasonable inference of a causal link between those actions and Webb's first EEOC charge. Therefore, Webb cannot establish a prima fade case of

retaliation with respect to his retaliation claim encompassed in his second EEOC charge.

Ball State further contends it is entitled to summary judgment on Webb's retaliation claim premised upon his removal as Chairperson of the Department--the retaliation asserted in Webb's third EEOC charge. Assuming that Webb could establish a prima facie case of retaliation regarding his removal as Chair, then the University must come forward with a legitimate, non-discriminatory reason for his removal. The court finds that it has. The University states that Webb was removed from his position as Chair before the expiration of his term because it was perceived by the administration that the Department was in chaos and that Webb disregarded Dean Johnstone's directives.

Because the University has articulated a legitimate, non-discriminatory reason for Webb's removal as Chair of the Department, the burden shifts to Webb to show that these reasons are pretexts for retaliation. He has not done so. The conclusory assertion in the Plaintiffs' response brief that the claim the Department was in chaos "is not true," (PIs.' Resp. to Defs.' Mots. to Dismiss and for Summ. J. at 39), unsupported by citation to any specific substantiating fact in the record, does not establish pretext. The Plaintiffs assert that their "only acts of 'insubordination' were their efforts to seek relief from the AF&E Committee, the Ad Hoc Committee, the Board of Trustees, the EEOC, the state court, and, most recently, this Honorable Court...." . . ." (Id. at 37.) The Plaintiffs contend there is a genuine issue of fact as to whether Webb was insubordinate to Johnstone. (Third Statement ¶ 34.) The materials cited in support, however, are insufficient to create a genuine issue. Rather than creating a genuine issue, the cited paragraph in Webb's affidavit of 1/19/98 actually supports the Defendants' claim that Webb was insubordinate to Johnstone. Webb does not dispute the

evidence that Johnstone directed him to make reassignments and he refused. (See Webb 1/1 9/98 Aff. ¶ 40 ("Johnstone instructed me to change the schedule and make reassignments that would benefit Hendricks and Byers."), ¶ 41 ("because of my refusal to reassign Hendricks and Byers"). Rather, Webb disputes whether Johnstone should have directed him to make reassignments, which Webb contends were contrary to the procedures in the faculty handbook. In addition, the cited testimony and exhibits from the preliminary injunction hearing do not create an issue of fact regarding Webb's insubordination to Johnstone. That Webb refused to abide by Johnstone's direction to change the schedule and make reassignments remains undisputed.

Webb must come forward with and direct the court's attention to specific evidence in the record to establish pretext. He has not done so. He therefore cannot prevail on a retaliation claim premised upon his removal as Chairperson of the Department.

For all these reasons, the court will GRANT the Defendants' motion for summary judgment on Webb's retaliation claim (Count II).

D. Count V - Sayles' Sex Discrimination Claim

As to Count V, Sayles' sex discrimination claim, Ball State contends, inter alla, that her claim is barred because it is beyond the scope of her EEOC Charges. The court agrees.

"When an EEOC charge alleges a particular theory of discrimination, allegations of a different type of

discrimination in a subsequent complaint are not reasonably related to them unless the allegations of the complaint can be reasonably inferred from the facts alleged in the charge." Cheek, 31 F.3d at 503. A sexual harassment claim generally cannot be reasonably inferred from allegations of sexual discrimination. See id.Logic suggests that the converse be true: a sexual discrimination claim generally cannot be inferred from allegations of sexual harassment.

Sayles, like Webb, filed three EEOC Charges. Of the three, only the first charge alleges any theory of sex discrimination. Her first charge, however, does not allege the same theory of discrimination that is alleged in the Complaint. Count V of the Complaint, entitled "Plaintiffs Sayles' Cause of Action for Sexual Discrimination" alleges that Sayles was subjected to disparate treatment because of her gender in violation of Title VII. (Compl. Count V ¶ 48.) Sayles' first EEOC charge, however, alleges sexual harassment by a co-worker. Sayles' disparate treatment claim in Count V is not like or reasonably related to an allegation of sexual harassment by a co-worker. In addition, there is nothing in the record to suggest that her disparate treatment claim would grow out of her sexual harassment claim. Sayles argues that she did not author her EEOC charge. For the reasons previously stated in the discussion of the scope of Webb's EEOC charges, this argument is unavailing.

Sayles also maintains that she subsequently submitted other documents, including Webb's 225-page manifesto to the Board, to the EEOC. If the EEOC considered the additional documentation as an amendment to one of Sayles' EEOC charges, then maybe her disparate treatment claim could be treated as within the scope of that charge. However, the Plaintiffs have produced no evidence whatsoever to even suggest that the EEOC treated the additional documentation

as such an amendment.

Because a sex discrimination claim was not included in any of Sayles' EEOC charges, she cannot assert such a claim in her Complaint. Thus, the Defendants' motion for summary judgment will be GRANTED as to Sayles' sex discrimination claim in Count V.

E. Count VI - Sayles' Title VII Retaliation Claim

As to Count VI, Sayles' retaliation claim, the University argues that: (1) Sayles' first EEOC charge failed to state a retaliation claim; (2) her second EEOC charge of retaliation fails to allege an essential element; (3) Ball State had legitimate, non discriminatory reasons for its denial of promotion to Sayles; and (4) Ball State had legitimate nondiscriminatory reasons for the actions alleged in Sayles' third EEOC Charge.

The court agrees that Sayles' first EEOC charge does not support her retaliation claim because it fails to specifically allege retaliatory acts. Sayles' first EEOC alleges only that "I believe that I have been discriminated and retaliated against" and that she had been "retaliated against." (Compl., Ex. 9.) The charge contains no further specification regarding the alleged acts of retaliation. Faced with a similar factual situation in Rush, the Seventh Circuit observed that "the requirement of some specificity in a charge is not a 'mere technicality." Rush, 966 F.2d at 1111. In her EEOC charge, the Rush plaintiff referred to the termination of her employment and alleged "I believe that I have been discriminated against because of my race, Black." Id. at 1108 n. 9. She brought racial harassment claims in her complaint. The court required "some detail" in the EEOC charge in

order "to allow the agency to perform its statutory duty." Id. at 1111. The court then held that the racial harassment claim was beyond the scope of the EEOC charge because the charge did not specifically describe the conduct giving rise to that claim. Id. at 1111-12. It said that "it will not suffice to file general charges with the EEOC, as was done here, and then to expect that this allegation will permit all claims of race-based discrimination in a subsequent lawsuit." Id. at 1112.

Sayles' first EEOC charge does not specifically describe the alleged conduct giving rise to her retaliation claim. Merely stating "I believe that I have been discriminated and retaliated against" is insufficient to bring a retaliation claim based on any and all conduct. The lack of any specificity in the charge prohibits a determination that the alleged retaliatory acts in the subsequent judicial complaint are within the scope of the charge. The Jenkins test simply cannot be satisfied. That is, it cannot be determined that the Complaint's allegations are "like or reasonably related to the allegations of the charge and growing out of such allegations." Without any indication in the charge of what particular act or acts Sayles' claims were retaliatory, a determination that the charge and the Complaint "describe the same conduct and implicate the same individuals" cannot be made. Therefore, the court holds that Sayles' general allegation that she was "retaliated against" in her first EEOC charge is insufficient to bring subsequent specific claims of retaliatory acts in the Complaint within the scope of the charge.

Sayles' second and third EEOC charges, however, do specifically describe the conduct giving rise to the retaliation claims asserted therein. These charges preserve Sayles' retaliation claim based upon these specific acts. No other allegedly retaliatory acts, however, come within the scope of

these charges and any claim based thereon is not cognizable.

As to Sayles' retaliation claim within the scope of the second EEOC charge, the Defendants contend they are entitled to summary judgment on this claim because Sayles cannot establish a prima facie case of retaliation. They also contend that even if Sayles could establish her prima facie case, they have a legitimate, non-discriminatory reason for denying her promotion which she cannot demonstrate is a pretext for retaliation.

In her second EEOC charge, Sayles alleges that she was retaliated against because she filed a charge with the EEOC on September 21, 1995. (Compl., Ex. 8.) fn34 The only specifically identified allegedly retaliatory act in Sayles' second EEOC charge is "I have been barred from having my name submitted from promotion and it can continue to effect my future with Respondent, including Tenure." (Id.) The Complaint alleges and the record evidence supports the finding that her application for promotion was denied by members of the P&T Committee on or about November 15, 1996. (Compl. ¶144(F).)fn35 Sayles can demonstrate the first and second elements of a prima fade case of retaliation, but she has not come forward with sufficient evidence to establish a causal connection between her September 1995 EEOC charge and the vote against her for promotion and tenure.

The Plaintiffs assert that the necessary causal link is established by the temporal proximity of the protected expression and retaliatory acts. The time span between Sayles' filing of her September 1995 EEOC charge and the denial of her promotion in November 1996--almost 14 months--does not even come close to the time spans in

cases in which the Seventh Circuit held that temporal proximity alone created a reasonable inference of a causal link. See Johnson, 945 F.2d at 980 (one day); McClendon, 108 F.3d at 797 (two to three days); Holland, 883 F.2d at 1314-15 (one week). The court concludes that the passing of a substantial length of time between the filing of Sayles' first EEOC charge and the denial of her promotion is simply too great to create a reasonable inference of a causal link between the two events.

> The Plaintiffs have not argued that the necessary causal link is demonstrated by anything other than the timing of the events. Nor have they directed the court's attention to any evidence in the record which would support a reasonable inference of a causal connection between Sayles' 1995 EEOC charge and her denial of promotion. Therefore, the court finds that Sayles cannot establish a casual link between her protected expression and the denial of her promotion.

Even assuming that there was sufficient evidence to create a question of fact as to the necessary causal link, Sayles' retaliation claim premised upon the denial of her promotion would not survive summary judgment. The University has come forward with a legitimate, non-discriminatory reason for the denial of promotion. For a favorable recommendation of promotion from the P&T Committee, a faculty member must be rated at least above average in the three rating categories of teaching, research or other scholarly activity, and professional service, and outstanding in at least one category, based on majority vote of the Committee. (Hendricks Aff., Defs.' App. Ex. 12, ¶ 3.) Sayles did not receive a majority vote of above average from the P&T Committee in the area of research or other scholarly activity and, therefore, did not receive a favorable

recommendation from the Committee. (Id. ¶ 3, Ex. E.) fn36 Because the University has proffered a legitimate, non-discriminatory reason for the denial of Sayles' promotion, the burden shifts back to Sayles to demonstrate that its reason is a pretext for retaliation.

In an effort to demonstrate pretext, Sayles "points out the lack of credence in the defendants' purported non-discriminatory reasons for denying her the right to proceed with her promotion and tenure application in her affidavit at ¶11 19-28 and elsewhere." (Pls.' Resp. to Defs.' Mots. to Dismiss and for Summ. J. at 40.) The court has scoured Sayles' affidavit of 12/22/97, particularly ¶¶ 19-28 and finds nothing that would support a reasonable inference that the University's proffered reasons were lies or had no basis in fact. Sayles' affidavit does not call into question the honesty of the belief of the University, Hendricks, Bennett or South in the reasons given for not recommending her for promotion or denying her appeals of the original P&T Committee's decision. Sayles' own conclusory assertions that Hendricks' statements "are a pretext for denying me the promotion," (Sayles Aff. ¶ 20), and that Bennett's version of events is "totally false and without merit and is a pretext to deny me due process and promotion," (id. ¶ 24), are insufficient to create a genuine issue of material fact as to pretext. See, e.g., Drake v. Minnesota Min. & Mfg. Co., 134 F.3d 878, 887 (7th Cir. 1998) (stating Rule 56 "demands something more specific than the bald assertion of the general truth of a particular matter, rather it requires affidavits that cite specific concrete facts establishing the existence of the truth of the matter asserted.").

With respect to Sayles' retaliation claim included within her third EEOC charge, the Defendants contend they are entitled to summary judgment because they had legitimate, non-discriminatory reasons for each of the

allegedly retaliatory acts. The Defendants describe the allegedly retaliatory acts as the removal of Sayles from her position as the Assistant to the Chairperson of the Department and "related actions." (Defs.' Mem. in Supp. of Mot. for Summ. J. on Counts I, II, V, VI, IX and X at 28.) They maintain that these actions were taken as part of the changes in the administration of the Department and refer back to their arguments and evidence presented regarding the removal of Webb from the position of Department Chairperson. Since the Defendants have articulated a legitimate, nondiscriminatory reason for the allegedly retaliatory acts, Sayles must produce evidence sufficient to show pretext.

In another effort to establish pretext, "Sayles points to the lack of credence to be given for defendants' asserted non-discriminatory reasons for action raised in her third EEOC charge, as set forth in her affidavit ¶ 35." (Pls.' Resp. to Defs.' Mots. to Dismiss and for Summ. J. at 40.) The cited paragraph wholly fails to establish that the University's stated reasons for removing Sayles from the Assistant Chair position and taking related actions (removing her from the position of Internship Co-Director and moving her out of her office) are pretexts for retaliation. Nothing in that paragraph calls into doubt the honesty of the stated reasons or reasonably suggests that the reasons have no basis in fact. Even assuming that the University was mistaken in its judgment that the Department was in chaos and that the removal of Sayles as Assistant Chairperson was in the best interest of the University, the Department and the students, a mistaken but honest belief does not suffice to establish pretext. Sayles' own statement that her removal "was done in direct retaliation for my having filed a state civil suit and a request for injunctive relief as well as for receiving a temporary restraining order against some of the defendants in this suit," (Sayles 12/22/97 Aff. ¶ 35), is a conclusory

allegation and, therefore, fails to create a genuine issue of material fact as to pretext. See, e.g., Drake, 134 F.3d at 887.

Therefore, the court will GRANT the Defendants' motion for summary judgment with respect to Sayles' retaliation claim (Count VI).fn37

F. Count IX - Wisner's Sex Discrimination Claim

The University moves for summary judgment on Count IX, Wisner's sex discrimination claim, contending that: (1) her claim is barred because it is beyond the scope of her EEOC charges; and (2) the Complaint fails to state a claim for sexual harassment. Wisner's sex discrimination claim fails for the same reasons that Sayles' sex discrimination claim fails.

Wisner filed three EEOC charges, only the first of which, filed December 20, 1996, alleges discrimination based on sex and retaliation. (Compl., Ex. 13.) Her second and third charges allege only retaliation. (Compl., Exs. 14, 15.)fn38 Indeed, it is noted that in responding to the contention that Count IX is beyond the scope of Wisner's EEOC charges, the Plaintiffs address only Wisner's first EEOC charge. By failing to argue that Wisner's second or third charges allege sex discrimination or sex harassment, the Plaintiffs waive such a claim. In addition, it is clear that neither the second nor third charge alleges a sexual discrimination claim.

The allegations in the body of Wisner's first charge--allegations of unwelcome verbal and physical conduct of a sexual nature--purport to allege a sexual harassment theory of

discrimination. Count IX of the Complaint, entitled, "Plaintiff Wisner's Cause of Action for Sexual Discrimination," however, alleges disparate treatment sexual discrimination. (Compl., Count IX ¶ 51.) Thus, as with Sayles, a sexual discrimination claim is beyond the scope of Wisner's EEOC charges.fn39 The argument that Wisner did not draft her EEOC charges fails for the same reasons it failed with respect to Webb and Sayles.

For these reasons, the Defendants' motion for summary judgment will be GRANTED with respect to Wisner's sex discrimination claim in Count IX.

G. Count X - Wisner's Title VII Retaliation Claim

As to Count X, Wisner's retaliation claim, the Defendants argue they are entitled to summary judgment because: (1) Wisner's first, second, and third EEOC charges fail to state a claim for retaliation; (2) she cannot establish that a materially adverse employment action was taken against her because of her alleged protected expression; and (3) it had legitimate nondiscriminatory reasons for her transfer.

The court agrees that Wisner's first EEOC charge is insufficient to support her retaliation claim because it lacks the specificity required by Rush v. McDonalds Corporation. Moreover, none of the conduct alleged in that charge, e.g., "having her job threatened," amounts to a materially adverse employment action. So it is with Wisner's second EEOC charge: the actions allegedly taken against her, e.g., rude facial expressions from faculty, do not amount to materially adverse actions. Wisner's transfer is the only arguably

adverse action against her.fn40

In arguing that her transfer is an adverse action Wisner asserts that (1) she used to supervise four students in the Department but in her new position she supervises no one; (2) she is treated "more like a student working than an administrative coordinator" in her new position; and (3) she was placed on a probationary period in her new position. Even assuming the truth of these assertions, they are insufficient to establish that Wisner's transfer constitutes a materially adverse employment action.

The uncontradicted evidence is that Wisner was transferred from her position as Administrative Coordinator of the Department to a new position as Programs Assistant in the Center for Environmental Design, Research and Service in CAP. Wisner's new position is in the office of the Dean, whereas, her former position was in the office of the Department Chair. (Beck Aff., Ex. 7 to Defs.' App., ¶ 3.) It is undisputed that Wisner's new and former positions carry the same salary grade and salary. A lateral transfer does not constitute a materially adverse employment action. See, e.g., Flaherty v. Gas Research Inst. 31 F.3d 451, 457 (7th Cir. 1994) (a lateral transter, where employee's title was changed and employee reported to former subordinate, did not constitute an adverse employment action); Crady, 993 F .2d at 135-36 (lateral transfer to job with same salary, benefits and level of responsibility was not an adverse employment action). The evidence suggests that Wisner's transfer was a lateral transfer.

Even assuming that Wisner supervised four student workers in her former position and supervises no one in her new position (a fact that the parties dispute), the evidence is

insufficient to establish that Wisner's transfer constitutes a materially adverse employment action. Despite the lack of supervision over student workers, there is no evidence that Wisner's material responsibilities from her former position to her new position are "significantly diminished." Moreover, Wisner's employment has not been terminated and, as stated, her salary and grade remain the same. Nothing in the record suggests that Wisner suffered any loss of benefits or that her new title is less distinguished than her former title. Nor are there any other indices to suggest that Wisner's transfer is a materially adverse employment action.

Assuming that Wisner was placed on a probationary period (which the parties dispute), the Plaintiffs have pointed to no evidence regarding such probation--what does it involve? how long does it last?, etc. Thus, the trier of fact would be unable, based on the record before the court, to determine that the probationary period rendered Wisner's transfer a materially adverse action. Wisner's statement that she is treated "more like a student worker than an administrative coordinator" in her new position is conclusory and unsupported by any factual allegations. Thus, this conclusion is insufficient to create a genuine issue of fact for trial as to whether Wisner's transfer constitutes a materially adverse employment action. See, e.g., Drake, 134 F.3d at 887.

Even assuming that Wisner could establish a materially adverse action, the Defendants still would be entitled to summary judgment on her retaliation claim. The University has proffered a legitimate, nondiscriminatory reason for Wisner's transfer:

She was transferred for her own benefit and in the interest of the University and the Department. Beck

transferred her in order to avoid a potentially problematic relationship between Hendricks as Chair and Wisner as the Administrative Coordinator. Thus, the burden shifts to the Plaintiffs to establish that this reason is a pretext for retaliation.

In their response brief, the Plaintiffs argue that Wisner's "affidavit (throughout)" establishes that the reasons proffered for Wisner's transfer are pretext for retaliation against her. (Pls.' Resp. to Defs.' Mots. to Dismiss and for Summ. J. at 41.) It is noted that by citing to Wisner's affidavit "throughout," the Plaintiffs have failed to specifically cite to evidence in the record as Rule 56 requires. In any event, review of Wisner's affidavit in its entirety reveals nothing which would establish pretext. Her affidavit does not create a genuine issue as to whether the University's proffered reason is a lie or phony reason. Wisner's own belief that Beck was lying is insufficient to create a genuine issue of material fact. Nor has Wisner come forward with anything to establish that the proffered reason had no basis in fact. A cursory review of the filings in this case, including Wisner's EEOC charges and the testimony presented at the preliminary injunction hearing, establishes that the reasons the University gives for transferring Wisner do have a substantial factual basis.

Accordingly, the court will GRANT the Defendants' motion for summary judgment on Wisner's retaliation claim (Count X).

## IX. DEFENDANTS' REQUEST FOR ORAL ARGUMENT

The Defendants request oral argument on their pending motions to dismiss and motions for partial summary judgment. The court finds oral argument unnecessary.

Accordingly, the Defendants' request is DENIED.

## X. DEFENDANT RICHARDS' PETITION FOR AWARD OF ATTORNEY FEES

On December 30, 1997, the court granted Defendant Richards' request for attorney fees incurred in moving to quash a subpoena issued to her by the Plaintiffs. Richards' counsel states that he expended 3.6 hours in moving to quash the subpoena and that the rate he charged for said work was $125.00 per hour, for a total cost of $450.00. The Plaintiffs have not challenged either the amount of time expended by counsel nor the hourly rate charged. Finding both the expenditure of time and the hourly rate reasonable, the court determines that Defendant Richards' petition should be GRANTED. It is therefore ORDERED that the Plaintiffs shall pay to Roger P. Ralph, counsel for Defendant Richards, the sum of $450.00 within 30 days of the date of this entry.

## XI. DEFENDANTS' VERIFIED PETITION FOR BILL OF COSTS

On February 24, 1999, the Defendants filed their Verified Petition for Bill of Costs, pursuant to FED. R. APP. P. 39. They seek taxation of the cost of the transcript of the six-day preliminary injunction hearing. The verified petition as well as the court reporter's invoice attached to the petition reflect the cost of the transcript as $4,230.00.

The Plaintiffs filed an Objection to Defendants' Bill of Costs. They argue that since they ordered the transcript of the proceedings, pursuant to FED. R. APP. R. 11(b) and

Circuit Rule 11(b), as they were required to do, the transcript became part of the record on appeal and was available for withdrawal by the Defendants and their attorney pursuant to Circuit Rule 11(d). Thus, the Plaintiffs contend the transcript ordered by the Defendants was purchased for their or their counsels' personal convenience and was not necessary for the determination of the appeal.fn41

Rule 39 of the Rules of Appellate Procedure provides for the taxation of certain costs against the appellant if the judgment of the district court is affirmed. FED. R. APP. P. 39(a)(2). Subdivision (e) provides for taxation in the district court of certain costs on appeal, including "the reporter's transcript, if needed to determine the appeal.. . ." FED. R. APP. P. 39(e)(2). On February 5, 1999, the Court of Appeals entered its decision and its Judgment, affirming this court's denial of the Plaintiffs' motion for preliminary injunction, with costs to be awarded the Defendants/Appellees.

The court agrees that the Defendants purchased the reporter's transcript for their own or their counsel's convenience and that the transcript was not necessary for the determination of the appeal. Costs are not allowed when they are incurred for the convenience of the parties or their attorneys. See, e.g., Haroco, Inc. v. American Nat'l Bank & Trust Co., 38 F.3d 1424, 1441 (7th Cir. 1994) (costs for set of copies of discovery documents "for the attorney's convenience" held non-allowable); McIlveer v. Stone Container Corp., 910 F.2d 1581, 1584 (7th Cir. 1990) (party may not recover costs incurred in copying court filings for its own use rather than for use in the case); In re Baker, 206 BR. 510, 515 (Bkrtcy N.D. Ill. 1997) (extra copies of pleadings or copies merely for the convenience of attorneys are not taxable costs).

The Plaintiffs were required by FED. R. APP. P. 10 and 11 to order from the court reporter the transcript of the preliminary injunction hearing not already on file and which they considered necessary. Once a transcript is ordered by an appellant, a court reporter is required by FED. R. App. P. 11(b)(1) to prepare and file that transcript with the district clerk. Pursuant to Rule 11(d) of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit, the Defendants' attorney could have withdrawn the record of this case on appeal. See U.S. Ct. of App. Seventh Cir. Rule 11(d). The record on appeal includes the transcript filed by the court reporter. FED. R. App. 11(b). Thus, the Defendants' attorney could have obtained the transcript of the preliminary injunction proceedings from the Clerk of the Court of Appeals. Alternatively, the Defendants could have requested use of the Plaintiffs' copy of the transcript. The Defendants should not be allowed to recover the costs for the transcript which they ordered when they could have obtained either the original transcript filed with the Clerk or could have requested use of the Plaintiffs' copy of the transcript. See Fleming v. Kane County, 686 F. Supp. 1264, 1270 (N.D. Ill. 1988) (denying request for the costs of a transcript where the party seeking the costs could have requested use of a transcript copy from opposing counsel), aff'd, 898 F.2d 553 (7th Cir. 1990). Given the availability of the original transcript, the Defendants unnecessarily ordered their own transcript.

The Defendants respond that "ready reference" to the record, thus including the transcript, in the final days before the appellate oral argument was necessary to counsel's preparation for argument. Though having the transcript ready and available would no doubt be helpful, such availability is merely for the convenience of counsel. During the final days before oral argument the Defendants had already prepared and filed their appellate briefs. There is nothing to suggest that thorough note taking from the transcript withdrawn from

the Clerk of the Court of Appeals (or borrowed from the Plaintiffs) could not have been a sufficient aid to defense counsel's preparation for oral argument.

The Defendants also assert that their counsel needed the transcript to commence working on the appeal because of the transcript's length and counsel's commitment to another matter scheduled for trial on February 9, 1998, which lasted until March 17, 1998. Thus, defense counsel desired to begin working on the Defendants' response to the anticipated appeal because of other professional commitments. This was for nothing other than convenience's sake.

The Defendants also argue that though Circuit Rule 11(d) permits a party to withdraw the record, it does not require a party to rely on the transcript filed with the court of appeals in preparation of the brief or arguments. They are correct. However, the fact still remains that the Defendants' attorney could have withdrawn the record, including the transcript, and, therefore, did not have to incur the cost of the reporter's transcript.

Having determined that the Defendants ordered the reporter's transcript of the preliminary injunction proceedings for either their own convenience or that of their counsel, the court concludes that the cost of that transcript is not taxable to the Plaintiffs.fn42 Therefore, the Defendants' petition for a bill of costs is DENIED.

## XII. CONCLUSION

For the foregoing reasons, the court: (1) DENIES the

Defendants' Request for Oral Argument; (2) GRANTS the Defendants' Motion to Strike Affidavits; (3) GRANTS Defendant Wynola Richards' Motion to Dismiss; (4) GRANTS the Defendants' Motion to Dismiss Pursuant to Federal Rule of Civil Procedure ("FED. R. CIV. P.") 12(b)(6) (which has been treated as a motion for summary judgment); (5) GRANTS the Defendants' First Motion for Partial Summary Judgment with respect to the claims against Defendant McCune asserted in Counts III, IV, VII and VIII of the Complaint; (6) GRANTS the Defendant, Board of Trustees of Ball State University's Second Motion for Summary Judgment; (7) GRANTS Defendant Richards' Petition for Award of Attorney Fees, ORDERING the Plaintiffs to pay to Roger P. Ralph, counsel for Defendant Richards, the sum of $450.00 within 30 days of the date of this entry; and (8) DENIES the Defendants' Verified Petition for Bill of Costs.

Given these rulings, the court need not address the Plaintiffs' Motion for Disqualification of Counsel.

Final judgment will be duly entered in accordance with this entry.

ALL OF WHICH IS ORDERED this 5th day of January 2000.

John Daniel Tinder, Judge United States District Court

FOOTNOTES

1 These historical and procedural facts are presented as background for the court's discussion of the pending

dispositive motions. As the extensive filings and transcript from the preliminary injunction hearing in this case demonstrate, many facts are not disputed, but the parties hotly dispute many other facts relating to the Plaintiffs' employment and their claims. Facts which are material to the court's ruling on the dispositive motion, if not included in this Background section, are included in the Discussion section of this entry addressing the claim or claims to which those facts are material.

2 Sayles complained of sex discrimination by Hendricks. Ho complained of racial and national origin discrimination by Webb and harassment by all three Plaintiffs. Hendricks complained of harassment by all three Plaintiffs as well. Bryan Byers complained of harassment by Webb, and Jean Comley complained of sex discrimination and sexual harassment by Webb. (id.)

3 The Plaintiffs had sent a copy of their response brief to the Defendants by facsimile transmission on December 24, 1997.

4 Interestingly, the Plaintiffs state an intention to amend their Complaint as to the § 1983 claims so as to name only those defendants whose conduct occurred within the applicable limitations period. To date, however, they have not sought leave to amend.

5 The language contained in the affidavits which is omitted here and replaced by ellipses is stricken. Ellipses are used here for expediency's sake.

6 As stated, the Plaintiffs' Third Statement encompasses the Plaintiffs' Statement, Supplemental Statement and Addendum. Therefore, the court's discussion is limited to the Third Statement.

7 SGI #6 is whether certain defendants met with Hendricks

and other members of the Department to strategize in bad faith about ways in which to undermine Webb's authority as Chair because of his opposition to and reporting of misconduct, nonfeasance, and sexual harassment in the Department. Paragraph 30 of Webb's affidavit of 12/24/97 is cited as evidence of such meetings, agreements, and strategies. That paragraph provides in part: "The behavior of Jim Hendricks, Bryan Byers, Michael Brown, Jean Comley, and Taiping Ho during the fall semester of 1996, made it very clear that they had met with Provost Vander Hill or his subordinate, Dean Johnstone." This is a conclusory statement. It therefore is disregarded by the court. Moreover, at most, this paragraph as well as the cited transcript pages and exhibit establish only that certain defendants met with Vander Hill or Johnstone. These materials do not substantiate the Plaintiffs' claims regarding the purpose of any such meetings

8 SGI #7 is whether certain defendants took adverse employment actions against Webb to punish him for breaking off his relationship with Wynola Richards and because of his reporting of misconduct, nonfeasance, and sexual harassment on the part of those defendants' friends and associates. As support, they rely on ¶ 31 of Webb's 12/24/97 affidavit and transcript pages from the preliminary injunction hearing. The Defendants contend this paragraph contains conclusory statements and is not based on Webb's personal knowledge. The court agrees that the statement in ¶ 31 is insufficient to create a genuine issue of fact. In any event, ¶ 31 does not support SGI #7. It does not say that Van Meter and Eidson took adverse actions against Webb for the two reasons given. Instead, it merely says that they were prevented from retaliating against Webb until 1993 when Webb ended his relationship with Richards. Similarly, the transcript pages and exhibit cited do not substantiate this statement of a genuine issue.

9SGI #34 is whether Webb was insubordinate to Johnstone or anyone else. ¶41 of Webb's 1/19/98 affidavit cited in support is merely a conclusory denial of insubordination and, therefore, does not create a genuine issue on this matter. The Plaintiffs also cite to exhibits and two transcript pages of the preliminary injunction hearing, which is the portion of Webb's testimony in which he accuses others of insubordination and has nothing to do with the matter of Webb's insubordination.

10 SGI #37 is whether Wisner's removal from her position as Administrative Coordinator at the Department was in retaliation for her filing sexual harassment complaints against some of the defendants with the Affirmative Action Office and the EEOC. Wisner's 12/22/97 affidavit ¶¶ 2, 7, 8, 9, and 10, Wisner's testimony and exhibits introduced at the preliminary injunction hearing are cited in support. Paragraph 2 contains two conclusory statements that Wisner did not receive a lateral transfer. Paragraphs 7 and 8 address the meeting at which Beck informed Wisner that she would be transferred to another office; they do not provide support for SGI # 37. The second sentence in ¶ 9 is a conclusory assertion and will be disregarded.

11 SGI #41 concerns whether the Plaintiffs' actions were purely personal in nature or were part of their efforts to raise matters of public concern. The Plaintiffs' testimony and paragraphs from their affidavits are cited in support. With the exception of ¶11 5, 12 and 14 of Webb's 12/24/97 affidavit, the cited paragraphs fail to establish whether the unspecified "actions" taken by the Plaintiffs were personal in nature or raise matters of public concern. Paragraphs 5, 12 and 14, however, tend to support a finding that Webb's speech was not on a matter of public concern. (¶ 5 references Webb's request for: resources for the Department, permission to replace Professor Cotlar, and support from the offices of the Dean, Provost and President; ¶ 12 claims that Hendricks,

Vander Hill, Worthen and Johnstone were trying to disrupt the Department; and ¶ 14 refers to Johnstone's alleged interference with Webb's duties and responsibilities and Johnstone's alleged support of the insubordination of Hendricks and Dr. Byers.) Much of ¶ 3 of Webb's affidavit is inadmissible hearsay, the last sentence in that paragraph is conclusory and there is nothing to suggest that it is based on Webb's personal knowledge. The statements in ¶ 6 and the second and third sentences in ¶ 8 are conclusory allegations. The last sentence of ¶ 14 is conclusory and unsupported by fact. The sentence in ¶ 22 that Sali Falling has used her office to harass Webb is conclusory. Lastly, ¶ 32 ("After filing my complaint with the Affirmative Action Office and the Board of Trustees on June 30, 1995, I have been continuously retaliated against"), asserts an ultimate conclusion.

The following portions of Sayles' affidavit of 12/22/97 are conclusory and should be disregarded: the first two sentences and last sentence in ¶; third and last sentences in ¶ 16; last two sentences in ¶ 17. In addition, the cited transcript pages of Sayles' testimony at the preliminary injunction hearing fail to substantiate this SGI.

12 In support of SGI #4 the Plaintiffs cite to all paragraphs of their affidavits in addition to pages of the transcript of the preliminary injunction hearing. By citing to all paragraphs of the affidavits without a specific citation to any portion of any affidavit, the Plaintiffs have effectively cited to nothing in contravention of Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56.1. The court is not obligated to search the record for a genuine issue of material fact without guidance from the Plaintiffs. See, e.g., Brasic V. Heinemann's Inc., 121 F.3d 281, 285 (7th Cir. 1997) ("It is not our task, or that of the district court, to scour the record in search of a genuine issue of triable fact. We rely on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment."); Northwestern Nat'l Ins. Co. v. Baltes, 15 F.3d 660, 662-63 (7th Cir. 1994)

("District judges are not archaeologists. They need not excavate masses of papers in search of revealing tidbits.. . ."). SGI #4 exemplifies the deficiencies with other SGIs in which the Plaintiffs have failed to cite to specific materials. The court declines the invitation to make the Plaintiffs' record for them.

13 As stated in a prior pretrial conference, this motion is being treated as a motion for summary judgment. The court, however, retains the original title of the motion to avoid confusion with the Defendants' other summary judgment motions.

14 It is noted, however, that these Counts also seek equitable relief against the Defendants. An action against a state official seeking prospective equitable relief for ongoing or threatened violations of federal law is not barred by the Eleventh Amendment. See, e.g., Seminole Tribe, 517 U.S. 44, 73 (1996); Ex Parte Young, 209 U.S. 123, 159-60 (1908); Marie O., 131 F.3d at 615.

15 In any event, Webb does not allege, and there is no evidence, that the ad hoc committee took any action against him.

16 There is evidence that the Committee recommended that Webb receive a written reprimand, but the Provost overruled the recommendation and Webb did not receive such a reprimand. (Ronald Johnstone Aff., Ex. 2 to Defs.' App., ¶ 4.)

17 Thus, any claim by the Plaintiffs that certain actions were procedural violations fails to establish a property interest protected by the federal Constitution.

18 Nor has he shown any tangible loss of other employment opportunities as the result of the anonymous letter he attributes to Defendant Hendricks, the newspaper articles written by Defendant AId ridge, or the newspaper article regarding computer tampering.

19 Nor is there any evidence that would satisfy the third or fourth elements.

20 The court, however, takes judicial notice of Susan L. Sayles v. Board of Trustees of Ball State University, IP99-0897-C-T/G, another case in this court assigned to the undersigned in which Sayles alleges that her employment with the University was terminated at the end of the Spring 1999 semester. Even if her subsequent discharge enables Sayles to satisfy the first prong under Strasburger, the record is still devoid of any evidence to satisfy the second, third and fourth elements.

21 After Dunn, a different Seventh Circuit panel stated, without reference to Dunn, that the "Glucksberg fundamental rights analysis generally applies in substantive-due-process cases, but for particular circumstances such as the high-speed chase in Lewis or pre-trial detention, the specialized analysis adopted for those circumstances would apply." Khan v. Gallitano, 180 F.3d 829, 836 (7th Cir. 1999). The court in Khan applied the Glucksberg fundamental rights analysis to a case that did not involve legislation, but involved the allegedly tortious conduct of government officials. However, the court in Dunn indicated that the Glucksberg fundamental rights analysis applies only when the focus of a substantive due process case is on legislation. To the extent there is any discrepancy between Khan and Dunn about the scope of the Glucksberg fundamental rights analysis, it is irrelevant in this case, because this court analyzes the Plaintiffs' substantive due process claims under both the Lewis "shocks the conscience" analysis and the Glucksberg "fundamental

rights" analysis. Cf. Khan, 180 F.3d at 836 (analyzing the case under both the "shocks the conscience" analysis and the "fundamental rights" analysis); Dunn, 158 F.3d at 965-66 (same).

22 See, e.g., Webb 12/24/97 Aff. ¶ 3 ("I met with [President] John Worthen on January 9,. 1995, and explained the difficulties I was experiencing with Dean Johnstone and Warren Vander Hill as they related to Assistant Professors Cotlar and Meagher. ."; "Cotlar enjoyed the support of Dean Johnstone, Provost Vander Hill and President Worthen in spite of his misconduct"), ¶ 4 (stating that Webb requested to appear before the Board of Trustees, but President Worthen refused to place him on the Board's agenda), ¶ 5 (stating that in his June 30, 1995, Complaint to the Board of Trustees, Webb requested, inter a/ia, resources for the Department, "a commitment of support from the Dean's Office, Provost's Office, Affirmative Action Office, and the President's Office in terminating the employment of those who sexually harass students, and/or refuse to perform assigned duties in a reasonable way," a forum in which to resolve grievances against administrators, and a formal hearing before the Board because of futility of filing complaints with the AF&E Committee), ¶ 12 (referring to Webb's memorandum of November 20, 1996, in which he accuses Hendricks of disrupting the Department and claims Hendricks was encouraged by the Dean and Provost to be insubordinate to Webb as Chair and Sayles as Assistant Chair), ¶ 13 (claiming that an instructor, David Morris, was terminated because he supported Webb), ¶ 14 (Webb wrote a February 3, 1997, letter to President Worthen accusing Dean Johnstone of interfering with Webb's duties and responsibilities as Chair for assignment and scheduling of courses and faculty members); ¶ 15 ("Johnstone has not worked cooperatively" and "also interfered with my job performance and was instrumental in removing me from my position"), ¶ 20 (asserting that the AF&E Committee was used as a tool by

the administration to attack Webb and his colleagues); ¶ 29 (stating Cotlar boasted he would be protected by the administration from any complaints against him); Sayles 12/22/97 Aff. ¶ 2 (stating the Dean and administration demonstrated "hostility and lack of communication towards the [Department]" and that she was "placed in an adversarial position practically from the first day I arrived."), ¶ 5 (referring to a hostile takeover of the Department by Hendricks), ¶ 33 (criticizing Dean Johnstone for terminating one faculty member's employment).)

23 The Plaintiffs strive to distinguish Colburn, arguing that the plaintiffs in that case complained about purely private personnel interests--the denial of their promotions. The Plaintiffs claim that their speech was purely motivated by their concern for the University, its employees and students and that they had no private or personal interest at stake in their complaints, until they were retaliated against. (Pls.' Resp. to Defs.' Mots. to Dismiss and for Summ. J. at 8.) The Plaintiffs have not, however, cited to any evidence in the record, whether their own affidavits or otherwise, to support their claimed "pure motivation." But for the fact that the plaintiffs in Colburn complained about action taken against themselves (denial of promotion), whereas, here the Plaintiffs complain about the treatment of others, these two cases are factually quite similar.

24 In Phares, the plaintiff complained that the procedures involving medical records at the university where she was employed violated state law. 856 F.2d at 1007-08. The court concluded that though her complaints "tangentially raised issues of public concern," its context and form indicated that the thrust of her speech was on a personal matter. Id.

25 It is noted that there is evidence that during January

through May 1996, Webb filed complaints with the Secretary of Labor, the U.S. Department of Education Civil Rights Office, then Indiana Governor Evan Bayh, U.S. Attorney General Janet Reno, and then Indiana Attorney General Pamela Carter. (Webb Aff. 1/19/98 ¶¶ 42-46.) However, Webb's own affidavit establishes that the complaints to the Secretary of Labor and U.S. Department of Education were substantially the same as his June 30, 1995, manifesto to the Board of Trustees. As discussed, the point of that manifesto is the lack of support he and the Department were given by the administration, particularly the Dean and Provost, which is a private matter. In addition, Webb states that his complaints to Attorney General Reno and Attorney General Carter addressed the alleged interference with Webb's research by Worthen, Vander Hill, Johnstone, and Van Meter "for political reasons," which is a purely personal matter private to Webb. Furthermore, Webb's affidavit does not indicate the content of his complaint to Governor Bayh. His affidavit does, however, indicate that the complaint to Bayh, like the complaints to Reno and Carter included the 15 exhibits of the six-volume set of Plaintiffs' exhibits introduced at the preliminary injunction hearing. Review of these exhibits, which includes the June 30 memorandum to the Board of Trustees, suggests that the matters contained within Webb's complaints to Bayh, Reno and Carter are closer to the private end of the spectrum.

26 This provides an alternate basis for entry of summary judgment in favor of Defendant Aldridge.

27 It cannot seriously be contended that Defendant Aidridge deprived Webb of any First Amendment rights. It is clear from the record that the assertion of a deprivation of First Amendment rights--the retaliation claim--is not directed toward Aidridge. Thus, the court's discussion is limited to property and liberty interests under the Fourteenth Amendment.

28 They contend that all claims against the Defendants Richards, Van Meter, Eidson, Airriess, Loew, Avila, Earhart, Hayes, Henderson, Kabadaki, Lyon, Merten, Milner, Ulman, Wilson, Yardon, and McCune, individually, are barred by the applicable statute of limitations. They also contend that "certain claims alleged in the complaint" also are barred by the statute of limitations. Next, the Defendants assert a qualified immunity defense to claims against them individually. The Board argues that the Plaintiffs have pled no facts upon which to base their claims in Counts III, IV, VII, VIII, Xl, and XII against them individually. Defendant McCune contends that there is no factual basis for the § 1983 claims against him by Webb and Sayles asserted in Counts III, IV, VII, and VIII. Defendant Moll argues that Wisner has pled no facts upon which to base her claims against him in Counts XI and XII.

29 McCune is not a defendant as to Counts XI and XII.

30.The Defendants raise two other arguments in support of their motion for summary judgment as to Count I: that the claim is time-barred and that Webb fails to allege an essential element of his claim. The court need not reach these arguments since it has decided summary judgment is appropriate for other reasons.

31 Merely ending a consensual affair with one's supervisor does not constitute a statutorily protected activity. It is noted that the Plaintiffs have not argued to the contrary.

32 It is noted that the second EEOC charge does not allege that Webb was retaliated against because he opposed activity unlawful under Title VII. Only his first EEOC charge contains such an allegation.

33 The Plaintiffs have not come forward with any evidence to

suggest that the Defendants were responsible for the 5 anonymous letters sent to local media.

34She also alleges age discrimination in that charge, but she has not asserted an age discrimination claim in this action.

35The Defendants claim that the decision was made on December 2, 1996, and cite ¶ 12 of Johnstone's affidavit as support. Review of that paragraph, however, reveals that the P&T Committee met to evaluate Sayles' application for promotion on November 15, 1996. The letter advising Sayles of the Committee's unfavorable decision, (Johnstone Aff., Ex. BB), was dated December 2, 1996. A reasonable inference is that the Committee made its decision on or about November 15, 1996, but that Sayles was not advised of the decision until later. Nothing in ¶112 or Exhibit BB establishes that the Committee's decision was not made on or about November 15, 1996.

36 It is noted that Sayles had the opportunity to and did seek reconsideration of the P&T Committee's decision, and subsequently appealed the Committee's unfavorable decision, first to the College P&T Committee and then to the University P&T Committee. Reconsideration was denied; the appeals were denied unanimously. (Hendricks Aff. ¶¶ 4-5; Bennett Aff., Defs.' App. Ex. 13 ¶¶ 1-4, 8; South Aff., Defs.' App., Ex. 14, ¶ 6.)

37 In addition, as to the claims that Sayles was scheduled to teach classes at times Hendricks knew she disliked and was removed from her office, the court finds that these claims are not materially adverse employment actions.

38 Interestingly, in her second charge, Wisner states that her first charge was a "charge of discrimination, for harassment and retaliation.. . ." (Id., Ex. 14.) This supports the view that Wtsner's first EEOC charge was alleging a sexual harassment

theory of discrimination rather than a disparate treatment theory of sexual discrimination.

39 Interestingly, in Wisner's affidavit submitted in opposition to the Defendants' summary judgment motion she states that when submitting her first EEOC charge, she gave the EEOC representative "materials describing the harassment and retaliation I was being subjected to. . . ." (Wisner Aff. ¶ 14.) (Emphasis added). Wisner does not even claim in this affidavit to have submitted materials to the EEOC describing sexual discrimination.

40. It is noted that in the Plaintiffs' responsive brief, Wisner's transfer is the only action claimed to be an adverse employment action against her. (Pls.' Resp. to Defs.' Mots. to Dismiss and for Summ. J. at 41) ("Wisner's transfer, the conditions attendant to her new position, and the events leading up to that involuntary transfer, as set forth in her affidavit at ¶¶ 7-10 establish it and the attendant events constitute an 'adverse employment action' under Title VII.")

41 The Plaintiffs raise other arguments, which, though interesting, particularly their claim that the Defendants' petition for a bill of costs was untimely, need not be addressed given the court's decision on this matter.

42 The court doubts that the transcript ordered by the Defendants would satisfy the requirement of FED. R. App. P. 39(e) that it be "needed to determine the appeal" See Toner v. Commissioner, 76 T.C. 217, 222 (U.S. Tax Ct. 1981) (reasoning that the copy of the transcript purchased by the petitioner was used primarily to help the petitioner prepare for the appellate proceedings and that the cost therefore was not necessary for the determination of the appeal within the meaning of Rule 39(e)), affd, 676 F.2d 688 (3d Cir. 1982). The rule does not state that the costs of the reporter's transcript is taxable if the transcript is used by the party on

appeal, and the court believes that the language "needed to determine the appeal" means needed by the appellate court. After all, only the appellate court would have occasion "to determine" the appeal. Neither party has addressed the issue (indeed, the Defendants do not argue precisely that the transcript was needed to determine the appeal, but that it was needed to check the references in the Plaintiffs' brief, to prepare their own brief, and to prepare for oral argument) and its resolution is not necessary given the conclusion that the transcript ordered by the Defendants was ordered for mere convenience's sake.

IP 97-1268-T/G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GARY L. WEBB and MELISSA WISNER,
Plaintiffs,

v.

BOARD OF TRUSTEES OF BALL STATE UNIVERSITY, et al.,
Defendants.

Date: 8/19/1999

Entry on Motion to Lift Stay and for Other Relief

This cause comes before the court on the Plaintiffs' Motion to Lift Stay and for Other Relief, filed August 12, 1999. With this motion, the Plaintiffs seek an order lifting the stay in this case. They also seek leave to: (1) file supplemental affidavits in response to the Defendants' dispositive motions; (2) file an Amended Statement of Genuine Issues of Material Fact, citing page references to the transcript of the preliminary injunction hearing; (3) rebut through depositions and affidavits alleged 'erroneous findings or statements of fact" in the opinion of the Seventh Circuit Court of Appeals; and (4) conduct discovery on certain issues.

On February 11 , 1998 the court granted the Ptaintiffs' motion for a stay of these proceedings pending

disposition of their appeal of the partial denial of their motion for preliminary injunction (See Entry Granting Pls.' Mot. for Stay of Proceedings of 2/11/98.) The United States Court of Appeals for the Seventh Circuit has ruled on the Plaintiffs' appeal, affirming this court's decision. (See Judgment With Oral Argument of 2/5/99.) Consequently, the stays purpose has been served and the stay should be lifted to allow an orderly disposition of this case in the district court. Accordingly, the motion to lift the stay entered in this case on February 11, , 1998, is GRANTED

The Plaintiffs request leave to file an Amended Statement of Genuine Issues of Material Fact The Plaintiffs state that though they submitted Statements of Genuine Issues of Material Fact. they were unable to cite to relevant pages of the transcript from the preliminary Injunction hearing in support because the transcript had not yet been completed? The complete transcript was not filed until January 28, 1998. The court finds that the Plaintiffs' request to file an Amended Statement of Genuine issues with specific page and line references to the transcript of the preliminary injunction hearing should be GRANTED Therefore, the Plaintiffs shall have until September 1, 1999, within which to serve and file a Third Supplemental Statement of Genuine Issues As the history of pleadings discussed below demonstrates, the Plaintiffs have had numerous opportunities to make their record on the dispositive motions before the court The approval of yet another supplement to the prior statements of issues should not be construed to be an invitation to redo or correct any of the prior submissions. This additional supplement is allowed only so that the Plaintiffs can specify the portions of the preliminary injunction record which are not already part of the record on the dispositive motions and which support the Plaintiffs' opposition to the pending motions. Therefore1 their Third Supplemental Statement of Genuine issues is to be

substantiated only by specific citation to: (1 ) page and line references to the transcript of the preliminary injunction hearing, and/or (2) page references to any document admitted into evidence at the preliminary injunction hearing which is not otherwise a part of the Plaintiffs' or Defendants evidentiary submissions in connection with the Defendants' dispositive motions. The Defendants shall have until September 8, 1999 within which to serve and file a response to the Amended Statement of Genuine issues, if any. If the Defendants choose to forgo this opportunity, they should so inform the court as quickly as possible to allow a decision on the pending dispositive motions. Service of the Third Supplemental Statement of Genuine Issues and Response, if any, on counsel shall be on the same day as filing, by facsimile with duplicate copies sent by regular mail.

The Plaintiffs maintain that since the Seventh Circuit rendered Its decision the Defendants have committed further acts of retaliation against Webb, namely by assigning him four courses to teach during the 1999 summer semester and then removing him from those assignments for no justifiable reason. The Plaintiffs request that Webb be allowed to file an additional affidavit and materials in opposition to the Defendants' dispositive motions, presumably addressing these 1999 summer semester teaching assignments.

A brief review of the proceedings in this case relating to the pending dispositive motions is necessary. On August 4, 1997, the Plaintiffs commenced this action. On October 1 5, 1997, Defendant Richards filed her Motion to Dismiss, and the University Defendants filed their Motion to Dismiss Pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6) and Defendants (sic) First Motion for Partial Summary Judgment. On October 29, 1 997, the University Defendants filed their Second Motion for (Partial) Summary

Judgment. On October 30, 1 997, the Plaintiffs moved for an enlargement of time within which to respond to the dispositive motions filed by Richards and the University. The court granted that motion and gave the Plaintiffs until January 2, 1998, within which to respond

On December 1 2, 1 997, the Plaintiffs filed their Motion for Preliminary Injunction.

On December 29, 1997, the Plaintiffs filed Plaintiffs' Statement of Genuine Issues and Plaintiffs' Response to the Defendants' Motions to Dismiss and for Summary Judgment. The Defendants filed a brief in reply on December 29, 1997.fn1

The court held a five-day preliminary injunction hearing on December 30 and 31, 1997, and January 2, 5, and 6, 1998. The completed transcript of this hearing was filed with the court by January 28, 1998.

Upon the Plaintiffs' request, the court allowed them to supplement their Statement of Genuine Issues, which they did on January 21 1998, and again on January 22, 1995, by filing their Addendum to Plaintiffs' Supplemental Statement of Genuine Issues and Plaintiffs' Supplemental Statement of issues, respectively, Also on January 22, 1998, the Plaintiffs' Supplemental Response to Defendants Motions to Dismiss and for Summaty Judgment and Memorandum in Support was filed.

On February 4, 1998, the Defendants filed a brief in response to the Plaintiffs' supplemental brief. On February 5, 1998, the Plaintiffs appealed this court's decision denying in

part their motion for preliminary injunction. On February 11, , 1998, upon the Plaintiffs' motion, the court stayed the proceedings in the district court pending a decision on the Plaintiffs' appeal.

The Plaintiffs already have alleged that the Defendants committed numerous acts of retaliation against them, in fact, they allege a pattern of retaliatory acts, and they have relied on such acts in opposing the Defendants' dispositive motions. Indeed, the record before the court is voluminous. Moreover, as the procedural history of this case demonstrates, the Plaintiffs have had more than ample time within which to marshal evidence and prepare responses in support of their opposition to the dispositive motions. The first dispositive motions were filed on October 15, 1997. The Plaintiffs filed briefs and other materials in opposition to the dispositive motions through February 4, 1998. Thus, they had more than 3 1/2 months within which to respond to the dispositive motions. In contrast, under the local rules in effect at the time of this briefing, a party opposing a dispositive motLon ordinarily had fifteen days within which to respond.

The claimed additional acts of retaliation are not of a different type or character than the alleged retaliatory acts about which the parties have fully briefed. They appear to be a continuation of the alleged pattern of retaliatory acts as to which the Plaintiffs have already presented evidence and briefed in response to the dispositive motions. considering the pending dispositive motions and the voluminous record before It, if the court believes that evidence of additional allegedly retaliatory acts might make a difference in the outcome of the motions, then the court will allow the Plaintiffs to supplement the record regarding those acts. If, however, it is apparent that evidence iof more recent allegedly retaliatory acts would not make any difference in the outcome Of the dispositive motions, the court will decide

the motions on the record before it, Therefore, the Plaintiffs' motion to allow Webb to file an additional affidavit and materials in opposition to' the Defendants' dispositive motions is DENIED at this time.

The Plaintiffs also seek leave to "rebut" and "disprove" the Seventh Circuit's opinion of February 5. 1999, claiming that it contains "various erroneous findings or statements of fact that are unsupported by the record . . . ." (Pls.' Mot, at 3.) This request is brash, to say the least. This court lacks the authority to allow a litigant to challenge the decision by the Seventh Circuit Court of Appeals.

The Plaintiffs are assured, however, that the court's ruling on the dispositive and other motions pending before it will be based on the record before the court and only that record. Any statements, claims, or conclusions that are not substantiated by specific citation to affidavits or other admissible evidence on file as required by FED. R. Civ. P. 56 will be disregarded and will play no role in the courts decision on the pending motions. The Plaintiffs' request to conduct limited discovery on the issues of disruption and the performance of duties by the Plaintiffs and the Defendants is therefore DENIED.

Finally, the Plaintiffs request leave to conduct further discovery on certain matters: the qualified immunity defense raised by the Defendants and conspiratorial intent. The Plaintiffs maintain that they cannot produce admissible evidence of retaliatory motive without turther discovery. The Plaintiffs are attempting to put the cart before the horse.

Qualified Immunity shields government officials

performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 451 U.S. 800, 818 (1982); see also Rapier v. Harris, 112 F.3d 999, 1006 (7th Cir. 1999). Qualified immunity is intended to "permit the resolution of many insubstantial claims on summary judgment' and to avoid 'subject[ing] government officials either to the costs of trial or to the burdens of broadtreachifla discovery' in cases where the legal norms the officials are alleged to have violated were not clearly established St the time." Mitchell v. Forsyth, 472 U.S. 511 • 526 (1985) (quoting Harlow, 457 U.S. at 817-1 8).

Given this intent and clear direction from the Supreme Court, the court should decide the legal issue of qualified immunity before allowing thscovery. See Anderson v. Creighton, 483 US. 635, 646 (1986)(uOne ofthe purposes of the Harlow qualified immunity standard is to protect public officials from the broad-ranging discovery that can be peculiarly disruptive of effective government a w For this reason, we have emphasized that qualified immunity questions should be resolved at the earliest possible stage of a litigation.") (quotations and citations omitted); Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) ("Unless the plaintiffs allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery."); Harlow, 457 U.S. at 818 ("Until th[e] threshold immunity question is resolved, discovery should not be allowed."); Levenstein v. Salafsky, 364 F.3d 345, 347 (7th Cir. 1998) (stating that dispositive motions based on the qualified immunity defense "should be decided as early as possible, and thus when such a motion might be granted without discovery the district court is well within its discretion to address it"). To allow the Plaintiffs to conduct discovery related to the Defendants' qualified immunity defense at this stage would frustrate the

intent and purpose of that defense. Therefore, the Plaintiffs' request to conduct discovery relating to the qualified immunity defense, specifically as to the Defendants' awareness of the Plaintiffs' clearly established rights and retaliatory intent, is DENIED. fn2

As for the request to conduct discovery on the matter of conspiratorial intent, Initially it is noted that the Plaintiffs have not complied with FED. R. Civ. P. 56(f) Moreover, as stated supra, the record before the court is vast. The Plaintiffs have been given the opportunity to amend their Statement of Genuine Issues and to cite to specific pages of the transcript of the preliminary injunction hearing in support thereof. The Plaintiffs have failed to indicate why the evidence presented at the preliminary injunction hearing--a hearing that spanned five days--along with the voluminous submissions already of record in connection with the pending motions would be insufficient support for their conspiracy claims. Furthermore, they have failed to demonstrate why they could not have discovered such evidence as they now seek in the months this suit was pending prior to the conclusion of the briefing on the pending motions. Thus, the Plaintiffs' request for discovery on conspiratorial intent is DENIED

ALL OF WHICH IS ORDERED this 19th day of August 1999.

FOOTNOTES

1 The Plaintiffs had sent a copy of their response brief to the Defendants by facsimile transmission on December 24, 1997.

2 To defeat a claim of qualified immunity, "a plaintiff must allege a cognizable violation of a constitutional right clearly

established at the time of the alleged misconduct." McGrath v. Gillis, 44 F.3d 567, 569-70 (7th Cir. 1995). The determination of whether a right is "clearly established" is a question of law for the court to decide. Id. Proof of a defendant's awareness that a right was "clearly established" is not necessary to defeat qualified immunity. Thus, discovery on this issue would be irrelevant with respect to the defense of qualified immunity in any event.

No. 98-1317

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Gary L. Webb, et al., Plaintiffs-Appellants,

v.

Board of Trustees of Ball State University, et al., Defendants-Appellees.

October 30, 1998, Argued

February 5, 1999, Decided

COUNSEL:

For GARY L. WEBB, SUSAN L. SAYLES, MELISSA L. WISNER, Plaintiffs - Appellants: L. Anita Richardson, OFFICE OF THE CORPORATION COUNSEL, Chicago, IL USA. Jona Goldschmidt, Chicago, IL USA.

For BOARD OF TRUSTEES OF BALL STATE UNIVERSITY, FRANK A. BRACKEN, CHAD A. DAVIS, JEFFREY H. SMULYAN, Defendants - Appellees: Scott E. Shockley, DEFUR, VORAN, HANLEY, RADCLIFF & REED, Muncie, IN USA.

JUDGES:

Before Posner, Chief Judge, and Easterbrook and Ripple, Circuit Judges.

OPINIONBY:

EASTERBROOK

OPINION:

Easterbrook, Circuit Judge. The Criminal Justice and Criminology Department of Ball State University has suffered a collapse of cooperation and decorum. Adversaries in this case agree about the symptoms but not about the causes and cure. Gary L. Webb, a tenured professor and between 1991 and 1997 chair of the department; Susan L. Sayles, an untenured professor who has supported Webb in the internecine warfare; and Melissa L. Wisner, an administrative aide to Webb who was transferred within the University when Webb lost his position as the department's head, are the plaintiffs. They contend in this action under 42 U.S.C. § 1983 that the University retaliated against them for protected speech.

Webb believes that officials of the University's administration have had it in for him ever since 1991, when he engineered the removal of four members of the department. Hostility turned to warfare in 1994, when Webb filed a complaint accusing another member of the department of sexually harassing a student. Wynola Richards, the Assistant Provost with jurisdiction over such matters, had been dating Webb, but their relationship had ended. When Richards recommended a reprimand rather than immediate discharge of the faculty member in question, Webb accused Richards (and other members of the central administration, such as Ronald Johnstone, Dean of the College of Sciences and Humanities and thus Webb's immediate superior, and John E. Worthen, President of the University) of ethical lapses for not taking stronger action. During the ensuing months Webb filed multiple charges with the University's disciplinary machinery, and other members of the department--some of them objects of Webb's charges--responded by accusing Webb himself of improprieties, after which Webb charged his accusers with misconduct of their

own. Dissatisfied with the outcome of the initial waves of complaints, Webb wrote and presented to the President and the Board of Trustees a 225- page broadside laying blame on almost everyone but himself.

By this time Richards and at least two members of the department had quit. President Worthen appointed a committee of faculty members who had stood apart from the contretemps. After listening to presentations from the combatants, the committee decided that the antagonism could be resolved only by making personnel changes. Meanwhile, Webb and Sayles had begun filing charges with the EEOC. None led to a finding favorable to plaintiffs, but they believe that what happened next is retaliation for these filings.

In 1996 the faculty of the Criminology Department notified the administration that Webb had lost its support and should be replaced as chair by professor James Hendricks when Webb's term ended on July 1, 1997. About the same time Sayles came up for tenure and was passed over. President Worthen appointed Hendricks as the new chair, and Dean Johnstone directed Webb to cooperate with Hendricks in the transition. Instead of assisting Hendricks, Webb filed two suits in an Indiana court asking the judge to resolve a dispute about teaching assignments. Both suits were resolved in the University's favor by late February 1997. Webb's failure to facilitate the transition to Hendricks led President Worthen to authorize Hendricks to take over in March 1997; it was impossible to manage the Criminology Department with its own chair in litigation against the University.

Hendricks' elevation created a new problem, because Wisner, the department's "administrative coordinator," had filed multiple charges accusing Hendricks of improprieties. Norman Beck, the University's Director of Human Resources, transferred Wisner to a position in the College of Architecture and Planning, without loss of pay or prestige.

As the department's new chief, Hendricks issued a teaching schedule for 1998. Webb and Sayles objected to their assignments. That for Sayles is no longer in issue; in fall 1997 her therapist certified that she is clinically depressed and unable to teach. Webb believes that his assignment is retaliatory, and he has asked the district court in this litigation to require the University to let him teach classes that he deems appropriate to his fields of specialization. Webb's list of other supposedly unconstitutional acts is long: to quote from his brief, "Hendricks kept Webb's telephone number after Webb vacated the chairperson's office so that he would get all of Webb's telephone calls; . . . conducted meetings, elections, and other Department business in violation of 1992 Department policy that adopted Robert's Rules of Order; [and] formed committees without any tenured faculty except for himself" (citations to the record omitted), among many other sins.

Plaintiffs sought a preliminary injunction that would rejuggle the teaching schedules for the spring 1998 semester, move Wisner from the Architecture Department back to the Criminology Department (or another position that she finds "compatible"); and direct defendants to desist from any retaliation against or harassment of the plaintiffs. At plaintiffs' request, the district judge held a six-day evidentiary hearing during the Christmas season and made an expedited decision. In oral findings read from the bench on January 6, 1998, the district judge concluded that some of plaintiffs' speech likely is protected by the Constitution, but that the dispute is so complex and has become so personal that much of the speech and conduct is not protected. Compare Connick v. Myers, 461 U.S. 138, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983), with Pickering v. Board of Education, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968). The judge thought it impossible to sort out which was which on such short notice without the aid of plaintiffs--who have steadfastly insisted that it is the court's job, not theirs, to identify which aspects

of the rumpus have constitutional implications--and added that it was not necessary to do so, because the dispute had gone well past the exchange of ideas and entered the realm of disruptiveness, which entitles an employer to act in order to promote its mission even when the speech is constitutionally protected. Waters v. Churchill, 511 U.S. 661, 671-75, 128 L. Ed. 2d 686, 114 S. Ct. 1878 (1994) (plurality opinion), id. at 684-85 (Souter, J., concurring). The judge added that he thought that plaintiffs also had failed to establish irreparable injury.

The district judge informed the parties that he was working on written findings and conclusions that would supplement the oral statement, and that he expected to complete the work by March 1, 1998. But plaintiffs asked him to stay all proceedings, including release of the opinion, while they appealed. As a result the appeal has proceeded without the benefit of a written opinion. Many of the arguments plaintiffs make are untenable as a result. Repeatedly plaintiffs complain that the judge did not go into enough detail, especially concerning the finding of disruptive behavior. Where are the findings of fact to back this up?, plaintiffs inquire. The answer is that the findings are in the judge's computer and would have been released almost a year ago, except for plaintiffs' impatience to appeal. Perhaps they thought the oral findings more vulnerable than a written opinion would have been. But a judge is to be commended, not reversed, for accommodating a request for expedition and giving a summary oral explanation, with written findings to follow. Plaintiffs have only themselves to blame for the state of the findings; we shall proceed accordingly.

Several of the requests plaintiffs make (or imply) are not appropriate at this preliminary stage. We explained why in Hetreed v. Allstate Insurance Co., 135 F.3d 1155, 1158 (7th Cir. 1998): giving a plaintiff a particular job while the litigation continues has potentially high costs for the employer if the plaintiff eventually loses, for in the interim

the employer will have lost control of the workplace and may disburse salary that cannot be recouped; but waiting until the end of the case has low costs for the employee, because back pay and damages are available to compensate for any loss while the case proceeds. See also, e.g., Sampson v. Murray, 415 U.S. 61, 89-92, 39 L. Ed. 2d 166, 94 S. Ct. 937 (1974). The district judge therefore did not abuse his discretion in concluding that plaintiffs are not irreparably injured by deferring final decision about most of the relief they request.

Still, teaching one class rather than another has no obvious monetary equivalent, and the loss of teaching or scholarly experience in a particular field between now and the final decision may have effects on a scholarly career that are impossible to quantify. Likewise, ongoing harassment or retaliation could amount to irreparable injury. But to identify an irreparable injury is not to say that relief is in order. An injunction restoring Webb to certain classes imposes costs on other scholars--and on the University, whose ability to set a curriculum is as much an element of academic freedom as any scholar's right to express a point of view. Concurring in Sweezy v. New Hampshire, 354 U.S. 234, 263, 1 L. Ed. 2d 1311, 77 S. Ct. 1203 (1957), Justices Frankfurter and Harlan referred to the four freedoms of a university: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." Cf. Webster v. New Lenox School District No. 122, 917 F.2d 1004 (7th Cir. 1990); Stephen R. Goldstein, The Asserted Constitutional Right of Public School Teachers to Determine What They Teach, 124 U. Pa. L. Rev. 1293 (1976). A university's academic freedoms are qualified by the need to respect faculty members' civil rights--no university could have a policy of closing leadership positions to blacks or women, for example-- but when deciding who to appoint as a leader or teacher of a particular class, every university considers speech (that's what teaching and scholarship consists in) without violating the Constitution. See Feldman

v. Bahn, 12 F.3d 730 (7th Cir. 1993); Jeffries v. Harleston, 52 F.3d 9 (2d Cir. 1995). We need not attempt to determine when a court may interfere with a university's curriculum or choice of department heads; it is enough to say that the issues raised by a request for such relief are reason enough to withhold it at an early stage of a suit.

There is, moreover, an independent difficulty with plaintiffs' demand for immediate relief: is the University's ongoing conduct "harassment" or "retaliation," as plaintiffs insist, or is it the University's legitimate effort to make the best of a bad situation? One reason the University's actions might be deemed proper is that many (perhaps most) of plaintiffs' statements appear to be personal in nature, and therefore outside the first amendment. Although the immediate impetus for the current dispute-- Webb's complaint that another faculty member made inappropriate sexual requests of a student-- readily could be characterized as "speech on a matter of public concern", Connick, 461 U.S. at 146; Rankin v. McPherson, 483 U.S. 378, 384-87, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987), the dispute quickly became one about the power of the department's head (could he get rid of the other faculty member despite the action of the Assistant Provost?) and developed into a brouhaha about allocation of power within the University. That is potentially personal; and Webb at least took it personally. Plaintiffs blame the district court for failing to disentangle the public and private aspects of the speech, but we conclude that the court did not need to do so--for on this record the conclusion that plaintiffs became disruptive cannot be called a clear error or abuse of discretion.

Universities are entitled to insist that members of the faculty (and their administrative aides) devote their energies to promoting goals such as research and teaching. When the bulk of a professor's time goes over to fraternal warfare, students and the scholarly community alike suffer, and the university may intervene to restore decorum and ease

tensions. Webb wrote and presented to the Board of Trustees a book-length manuscript devoted to his grievances, but there is no evidence that during 1994-97 Webb produced any scholarly work. Webb's department melted down while he was at the helm; charges, countercharges, and litigation replaced education. How could any university recruit new faculty to the Criminology Department under these circumstances, or retain the best members of the existing faculty? The record also contains reports of considerable student dissatisfaction with the quality of the instruction during these years. Time that senior officials of the University (the Board, the President, the Provost) could have devoted to scholarly improvement or fundraising has been diverted to efforts to placate enraged faculty members and ameliorate the ensuing problems. Under the circumstances, the University's right as employer to achieve the organization's goals must prevail:

> The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.

Waters, 511 U.S. at 675 (plurality opinion). We do not rule out the possibility that on a more complete record plaintiffs may be able to show that scholarship and teaching proceeded at a normal pace while the intramural dispute festered, but as things stand the denial of injunctive relief must be affirmed.

## Constitutional Provisions

### Constitution of the United States, Amend. I.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

### Constitution of the United States, Amend. VII

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

### Constitution of the United States, Amend. XIV, § 1

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## Statutes

**42 U.S.C. § 1983**

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges of immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

**42 U.S.C. § 2000e2(a)(1)**

"It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

**42 U.S.C. § 2000e-3(a)**

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an

unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

**Rules**

**Fed. R. Civ. P. 56(b)**

"A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof."

**Fed. R. Civ. P. 56(c)**

"The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

**Fed. R. Civ. P. 56(c)**

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is

made and supported as provided by the rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."

**Fed. R. Civ. P. 56(f)**

"Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is just."

**Fed. R. Civ. P. 83(a)(1)**

"Each district court, acting by a majority of the district judges, may, after giving appropriate public notice and an opportunity for comment, make and amend rules governing its practice. A local rule shall be consistent with–but not duplicative of–Acts of Congress and rules adopted under 28 U.S.C. §§ 2072 and 2075, and shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule takes effect on the date specified by the district court and remains in effect unless amended by the court or abrogated by the judicial council of the

circuit. Copies of rules and amendments shall, upon their promulgation, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.

**Fed. R. Civ. P. 83(a)(2)**

"A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement."

**Local Rule 56.1, S.D. Ind. (1998)**

"In the text of the supporting brief or an appendix thereto, filed in support of a motion for summary judgment pursuant to Local Rule 7.1, there shall be a 'Statement of Material Facts,' supported by appropriate citations to discovery responses, depositions, affidavits, and other admissible evidence, as to which the moving party contends there is no genuine issue. In addition, as separate documents, the moving party shall file proposed findings of undisputed fact and conclusions of law, and a proposed summary judgment. Any party opposing the motion shall, within fifteen (15) days from the date such motion is served upon it, serve and file any affidavits or other documentary material controverting the movant's position, together with an answer brief that shall include in its text or appendix thereto a 'Statement of Genuine Issues,' setting forth with appropriate citations to discovery responses, affidavits, depositions, or other admissible evidence, al material facts as to

which it is contended there exists a genuine issue necessary to be litigated."

Supreme Court, U.S.
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(2)

No. 00-1205

In The

# Supreme Court of the United States

GARY L. WEBB and MELISSA L. WISNER,

*Petitioners,*

v.

BOARD of TRUSTEES of
BALL STATE UNIVERSITY, et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

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## I. STATEMENT OF THE CASE

### A. Statement of Facts

Gary L. Webb is a member of the faculty of the Department of Criminal Justice and Criminology ("CJC") at Ball State University ("Ball State" or "the University"). Dr. Webb, a tenured Associate Professor, was hired by Ball State in the summer of 1991 and was appointed that year by Dr. John E. Worthen, then President of Ball State University, to a three-year term as Chairperson of the Department. Pursuant to Ball State's *Faculty and Professional Personnel Handbook*, the President has the final responsibility for the appointment, retention and reassignment of department chairpersons. Dr. Worthen subsequently reappointed Dr. Webb effective July 1, 1994 for another three-year term.[1] (R. 63, Exhibits 1-A and 1-B). Petitioner Melissa L. Wisner was Administrative Coordinator of CJC from May, 1996 to March, 1997. (R. 115 at 1293-94).

In April 1994, Dr. Webb reported a matter of alleged sexual harassment of a student by a faculty member in the Department, Dr. Steven Meagher. (R. 111 at 731). The report was made to Dr. Wynola Richards, Director of Affirmative Action and Assistant Provost at Ball State, who contacted the student complainant and arranged for her to be interviewed by a member of her staff in the University Office of Affirmative Action. Dr. Richards then met with Dr. Meagher, and then again with the student. (R. 111 at 734).

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[1] References to the record in the trial court are indicated by "R" followed by the number of the document on the District Court's docket.

Dr. Richards, after consultation with University counsel, concluded that Dr. Meagher's conduct probably did not violate Ball State's sexual harassment policy because of a prior consensual dating relationship between the student and Dr. Meagher, and the fact that the complainant was not a student of his nor was he her supervisor. (R. 63, Exhibit 3). However, Dr. Richards did believe Dr. Meagher's conduct probably violated the University's *Faculty Handbook* provision regarding avoidance of exploitation of students for private advantage. (R. 63, Exhibits 3-A and 3-B). Accordingly, she decided to refer it to the University's Academic Freedom and Ethics Committee ("AF&E") which had jurisdiction over such cases except in matters involving termination of a faculty member. (R. 113 at 824; R. 63, Exhibit 3-C).

Dr. Webb believed Dr. Meagher should be immediately terminated, and was unhappy with Dr. Richards' decision. He met with Meagher on April 22, 1994 and demanded his resignation, threatening to recommend Meagher's immediate termination. (R. 63, Exhibits 3 and 3-F). This was despite Dr. Richards having already advised Dr. Webb that because Dr. Meagher was a regular full-time tenure track faculty member, he could not be fired with less than twelve (12) months' notice unless the University followed the cumbersome due process procedures required to terminate tenure track faculty. (R. 63, Exhibit 3 and 3-G). Dr. Richards also understood at or near this time that it was Dr. Meagher's intention to resign as soon as he could find another position. On May 3, 1994, Dr. Webb proceeded to recommend immediate termination of Dr. Meagher by memorandum filed with Dean Ronald Johnstone of the College of Sciences and

Humanities, to whom Dr. Webb reported on academic affairs. (R. 63, Exhibits 3 and 3-M).

Upon receipt of Dr. Richard's referral, the AF&E Committee began to process the complaint against Dr. Meagher during the summer of 1994, but had difficulty assembling a quorum. (R. 113 at 826; R. 63, Exhibit 4-E). However, on July 15, 1994 Dr. Meagher submitted his resignation from the University. (R. 63, Exhibit 4-O). Shortly thereafter, Dr. Richards withdrew her request that the AF&E Committee review his behavior, because his resignation made the matter moot. (R. 113 at 825; R. 63, Exhibit 3-P).

In September 1994 the AF&E Committee received a complaint from another faculty member in the Department, Dr. Andrew Cotlar, alleging inappropriate behavior, ethical violations, and interference with academic freedom by Dr. Webb. (R. 63, Exhibits 4 and 4-C). Dr. Richards, the Provost's designated representative on the AF&E Committee, advised Dr. Chris Airriess, Chairperson of the Committee, that the AF&E Committee had jurisdiction over the complaint, so Dr. Airriess sent a copy of Dr. Cotlar's complaint to Dr. Webb and invited him to appear in November 1994. (R. 113 at 841-842; R. 63, Exhibits 4, 4-E, 4-G, and 4-H). Dr. Webb declined to appear, instead sending Dr. Airriess a letter stating his opinion that the AF&E Committee should not be investigating Dr. Cotlar's complaint. (R. 63, Exhibit 4-I).

In January 1995, while the AF&E Committee was investigating Dr. Cotlar's complaint, a number of other faculty members in the Department also filed complaints with the AF&E Committee. Dr. Susan Sayles, Dr. James

Hendricks, Dr. Audralee Dallum and Dr. Jerome McKean, all members of the Department faculty, filed complaints against Dr. Cotlar, Dean Johnstone and others. (R.110 at 468; R. 63, Exhibits 4 and 4-P).

While these charges were still pending before the AF&E Committee, Dr. Webb submitted a memorandum to Dr. Richards dated February 28, 1995, which he followed up with a charge against Dr. Cotlar before the Committee, indicating he had just become aware of inappropriate behavior by Dr. Cotlar toward a student a year earlier. (R. 63, Exhibit 3-Q). Dr. Richards interviewed the student and encouraged her to file a sexual harassment complaint, but she declined. (R. 113 at 827-828). On April 6, 1995, Dr. Richards sent the student a memo reaffirming her willingness to help her, but the student did not pursue the matter. (R. 63, Exhibit 3-R). Due to the lack of interest on the part of the victim, and the fact that Dr. Cotlar had resigned and would be leaving the University in approximately one (1) month, Dr. Richards did not proceed further. (R.113 at 827). Dr. Cotlar left the University in early May 1995, at the end of the 1994-95 academic term. (R. 110 at 470; R. 63, Exhibit 3).

In each complaint filed by Dr. Sayles, Dr. Webb, or other Departmental faculty members, the AF&E Committee determined in March 1995 to recommend that no action be taken. (R. 63, Exhibits 4 and 4-P). It did recommend that Dr. Webb be reprimanded as a result of the Cotlar complaint. However, Dr. Webb appealed this recommendation to the Provost, Warren Vander Hill, who overruled the Committee's recommendation. Consequently, Dr. Webb did not receive a reprimand or any

other adverse action as a result of Cotlar's complaint. (R. 109 at 253-54; R. 63, Exhibits 4-O, 4-Q and 4-R).

Dr. Webb was dissatisfied with the AF&E Committee's decisions and with Dean Johnstone's office in general. Shortly after the AF&E decisions, he notified President Worthen that all of the full-time faculty from the Department would attend the April 1995 meeting of the Board of Trustees to present their concerns about the handling of the sexual harassment complaints involving Drs. Meagher and Cotlar, and other issues with the Dean's and Provost's Offices. (R. 63, Exhibit 1-D). The President informed Dr. Webb that such matters should be presented to the appropriate administrative office or University Senate committee. (R. 63, Exhibit 1-E). On June 6, 1995, Provost Vander Hill and Dean Johnstone met with the CJC Department faculty in an effort to get their relationship on a positive track, but to no avail. (R. 63, Exhibits 2-E and 2-F).

On June 30, 1995, Dr. Webb delivered to the President a 225-page memorandum addressed to the Trustees. It complained of alleged mistreatment of Dr. Webb and his Department by the Dean's and Provost's Offices, by the Affirmative Action Office, and others. It requested a hearing before the Board or a subcommittee of the Board. (R. 63, Exhibit 1-F). The President of the Board of Trustees responded on July 17, 1995 and informed Dr. Webb that the Board did not ordinarily intervene in disputes between academic departments and the Dean's or Provost's Offices. Mr. Parks, the Board President, referred the memorandum to President Worthen for further action. (R. 63, Exhibit 1-J).

Dr. Worthen decided to appoint an *ad hoc* Committee to review Dr. Webb's allegations and related issues. He chose four (4) of Ball State's most distinguished tenured faculty, none of whom had any prior relationship to the matters described in the 225-page memorandum. (R.63, Exhibits 1, 1-K and 1-L). The President asked them to review any matters which interfered with or detracted from the common mission of the University and the Department to provide excellent education to Ball State's students. Dr. Webb responded to the President's action with a letter in which he expressed his displeasure and accused Dr. Worthen of retaliation and harassment. (R. 63, Exhibit 1-M).

Shortly thereafter, during the pendency of the *ad hoc* Committee's investigation, Dr. Webb filed a discrimination complaint with the Equal Employment Opportunity Commission in September 1995. Dr. Webb accused the University of harassing him and retaliating against him for the ending of his relationship in late 1993 with Dr. Richards. (R. 63, Exhibit 6-X). Dr. Richards, as Director of Affirmative Action and Assistant Provost, was not Dr. Webb's supervisor, and had no authority over him. (R. 113 at 799, 837-838).

Dr. Webb appeared before the *ad hoc* Committee and provided it with a written statement of his contentions. It also interviewed a number of other witnesses, including Dean Johnstone. On November 21, 1995 the Committee issued a report recommending three possible options, and noting that the situation "defies a simple solution." The recommendations included relieving Dr. Webb as Chairperson in the Department, or removing Dean Johnstone. (R. 63, Exhibit 1-N). Dr. Worthen shared the Committee's

report with both Dr. Webb and Dean Johnstone who each submitted responses to him in December 1995 and January 1996. (R. 63, Exhibits 1-O, 1-P, 1-Q, and 1-R). After considering the Committee's report, its recommendations, and the responses of Dr. Webb and Dean Johnstone, the President determined not to remove either one of them from their administrative positions. (R. 63, Exhibit 1). In February 1996 Dr. Webb again wrote the President and requested a Board hearing. His request was denied by the President. (R. 63, Exhibits 1-R and 1-S).

In November 1996, the faculty in the Department voted to recommend that Dr. James Hendricks become Chairperson when Dr. Webb's term expired on July 1, 1997. On November 4, 1996 Dean Johnstone received a memo from six of the Department faculty regarding their concerns about Dr. Webb's performance as Chairperson, and requesting that the Dean remove him. (R. 63; Exhibit 2-O). During the next three months, the Department was awash in charges and countercharges of harassment, retaliation, discrimination and related matters. Faculty members were accusing Drs. Webb and Sayles, and the Department's administrative coordinator, Melissa Wisner, of various forms of misconduct, and the Petitioners in turn were filing such charges against their faculty colleagues. These charges were filed in the University's Office of Equal Opportunity and Affirmative Action. (R. 63, Exhibits 6-B through 6-I). The new Director of this Office, Sali Falling – who had replaced Dr. Richards following her resignation – issued letters to Webb, Sayles and Wisner requesting meetings with them to discuss the charges and their respective responses to them, if any. None of them took advantage of the opportunity. (R. 63,

Exhibits 6-J through 6-O). Notwithstanding this failure to respond, no action was taken against them as a result of the charges that were filed. (R. 63, Exhibit 6-P, 6-Q and 6-V). This November 1996 alignment of the faculty in the Department was a substantial change from the previous relationships which existed in 1995 and before, when all of the Department's faculty had supported Dr. Webb before the AF&E Committee and the *ad hoc* committee, and in the Department faculty meeting with the Provost and Dean. (R. 63, Exhibit 2).

Between December 1996 and February 1997, Dean Johnstone had given orders to Dr. Webb to cooperate with Dr. Hendricks in preparation for the Department Chair transition in July 1997, and to modify certain administrative orders that Webb had issued. These directives sought to ensure an orderly transition and were also given to the other outgoing Chairpersons in the College. (R. 63, Exhibit 2). Dr. Webb refused to cooperate with Dr. Hendricks or to comply with Dean Johnstone's directives. (R. 63, Exhibit 2-T). Finally, on February 13, 1997, the Dean wrote the Provost and the President a letter recommending the immediate removal of Dr. Webb as Department Chair, citing an atmosphere in the Department he described as "tense and debilitating in the extreme." (R. 63, Exhibit 2-U).

On February 14, 1997 President Worthen sent Dr. Webb a letter which included the Dean's and Provost's recommendations that he be removed as Department Chairperson and invited Dr. Webb to meet with him before he made a decision on removal. (R. 63, Exhibit 1-X). Dr. Webb and President Worthen met on February 27, 1997 and Dr. Webb submitted to Dr. Worthen his

written response to the recommendation of the Dean. The President later determined to remove Dr. Webb from his administrative position, effective March 4, 1997. Dr. Webb suffered no reduction in pay or benefits as a result of this decision. (R. 63, Exhibits 1-Y and 1-Z).

In December 1996, Ms. Wisner filed an EEOC charge alleging retaliation for supporting Dr. Webb, and also claiming that Dr. Hendricks, by then the incoming Department Chairperson, had sexually harassed her. (R. 63, Exhibit 6-DD). In February and March 1997, each of the Petitioners filed additional EEOC charges. These complaints alleged various anecdotal matters believed by the Petitioners to be further retaliatory acts. The University responded to each charge with its position statement. The EEOC did not conclude its processing of any of the charges before the Petitioners requested right-to-sue letters. (R. 63, Exhibits 6-EE through 6-SS).

Petitioner Wisner was appointed by Gary Webb in May 1996 to be administrative coordinator for the Department. The administrative coordinator is required to work closely with the Department Chairperson, as well as the Department faculty. (R. 115 at 1293-94; Exhibit 212). In November 1996, Dr. Norman Beck, then Executive Director of Human Resources and Auxiliary Services at Ball State, became aware that Dr. Hendricks had been elected Chairperson of the Department and that he and Ms. Wisner were not on good terms. Dr. Beck met with Ms. Wisner to see if she was interested in a possible transfer, but she did not follow up on Dr. Beck's offer. (R. 63, Exhibit 7).

When Dr. Webb was replaced as Department Chairperson in March 1997, Dr. Beck determined to transfer Ms. Wisner for the benefit of her, the Department, and the University. Among the reasons for this decision was that during the approximately four (4) months since Dr. Beck had met with her in November 1996, Ms. Wisner had filed two (2) EEOC charges accusing Dr. Hendricks of sex discrimination, retaliation and harassment. Charges had also been filed by Dr. Hendricks against Ms. Wisner with the University's Office of Equal Opportunity and Affirmative Action. (R. 63, Exhibit 7).

Dr. Beck arranged for a lateral transfer for Ms. Wisner to a new position as Programs Assistant in the College of Architecture and Planning. Her salary grade and benefits remained the same as in her former position. Instead of working in a Department Chairperson's office, her new job was in a Dean's Office. She was not required to undergo another probationary period in her new position, but, as is the case for all staff transfers and promotions, she did have a three-month "performance period" which she successfully completed. (R. 63, Exhibit 7). In fact, she received a very positive performance evaluation from her current supervisor resulting in a merit raise. (R. 115 at 1293-1295; Exhibit 212).

### B. Course of Proceedings and Disposition In The Court Below

Petitioners commenced this action by filing a forty-eight (48) page complaint on August 4, 1997 in the District Court for the Southern District of Indiana. The complaint was brought against the Board of Trustees of Ball

State University and also against forty-nine (49) individual Respondents in their official and individual capacities. The complaint alleged that the Respondents had violated and conspired to violate the Petitioners' constitutional rights and discriminated against Petitioners on the basis of their sex, in violation of 42 U.S.C. § 1983, § 1985 and Title VII of the Civil Rights Act of 1964.

On October 15 and 29, 1997 Respondents filed motions for summary judgment on all of Petitioners' claims. (R. 59-61, 72, 74). The motions were supported by thirteen detailed affidavits from the Respondents. (R. 63, 75). On October 30, 1997 Petitioners moved for an enlargement of time to respond to Respondents' motions. (R. 76). The District Court granted an enlargement to January 2, 1998 to respond to the motions. (R. 78).

On December 12, 1997 Petitioners filed a motion requesting a preliminary injunction. (R. 80). Attached to the motion were thirty-four (34) pages of affidavits from the Petitioners. On December 29, 1997 the Petitioners filed their responses to the pending motions for summary judgment. (R.87). Attached to this response were an additional thirty-seven (37) pages of affidavits from the Petitioners. At no time between the filing of the complaint in August 1997 and filing their responses to the summary judgment motions did Petitioners seek to conduct any discovery.

The District Court commenced the hearing on Petitioners' application for a preliminary injunction on December 30, 1997 and over the course of six (6) days

permitted Petitioners to present evidence, including calling for cross-examination two of the principal Respondents: Dean Johnstone and Provost Vander Hill. Each Petitioner also testified at length. At the conclusion of Petitioners' evidence, Respondents moved for judgment on the evidence. The District Court granted the motion. (R. 103).

On February 5, 1998 Petitioners filed their notice of appeal from the District Court's decision denying the injunction, and also moved for a stay of proceedings in the District Court. (R. 122, 124). The stay was granted on February 11, 1998 (R. 128). During the pendency of the first appeal, the Petitioners moved for leave to supplement the record in the summary judgment proceedings by submitting additional evidence. (R. 132). The District Court granted the request. (R. 134).

On February 5, 1999 the United States Court of Appeals for the Seventh Circuit affirmed the District Court's denial of the application for a preliminary injunction. *Webb v. Board of Trustees of Ball State Univ.*, 167 F. 3d 1146 (1999) (hereafter, "*Webb I*") (Appendix, p. 110a). The Petitioners' Petition for Rehearing was denied and the mandate received in the District Court on March 18, 1999. (R. 145).

On August 12, 1999 Petitioners moved to have the stay lifted, for leave to file supplemental affidavits, to file a third Amended Statement of Genuine Issues containing citations to the preliminary injunction transcript, and to conduct discovery on issues of intent, disruption and other matters. (R. 147). On August 14, 1999 the District Court vacated the stay and permitted Petitioners to file

the Third Amended Statement of Genuine Issues. Petitioners' request to conduct discovery or file more affidavits was denied.

The District Court granted Respondents' motions for summary judgment against all Petitioners on all claims on January 5, 2000. (Appendix, p. 4a). Petitioners filed their Notice of Appeal on February 2, 2000. (R. 160). On October 25, 2000 the Court of Appeals issued its decision affirming the District Court. No. 00-1319, 2000 U.S. App. LEXIS 27399 (7th Cir. Oct. 25, 2000) (*"Webb II"*) (Appendix, p. 1a).

## II. REASONS FOR NOT GRANTING THE PETITION

### A. The Court of Appeals conducted an appropriate review of the District Court's Judgment

Petitioners' appeal in *Webb II* raised only two issues: (1) that the District Court abused its discretion by denying their August, 1999 request to conduct additional discovery, and (2) that, because of the nature of the claims involved, summary judgment was inappropriate. *See* Petitioners' Brief at 11-12, fn. 8. Petitioners' briefs filed in support of their argument in the Court of Appeals in *Webb II* failed to contain references to specific facts before the District Court to demonstrate that genuine issues existed and failed to provide a reasoned discussion of Judge Tinder's lengthy and detailed analysis of the facts as applied to their claims in his January 5, 2000 ruling.

The record below demonstrates that Petitioners submitted a significant amount of evidentiary material to the District Court in their effort to avoid summary judgment.

*See* description at p. 11 of Petitioners' Brief. However, Petitioners' approach of simply trying to characterize their claims as the type for which summary judgment is inappropriate ignored the plain dictates of Rule 56(e), Fed. R. Civ. P. which requires the non-movant to identify competent evidence that demonstrates a genuine issue for trial, rather than merely resting on the allegations in the complaint. The Court of Appeals was under no obligation to scour the record to identify facts for Petitioners, or to frame Petitioners' arguments for them.

Petitioners misapprehend the comments in prior decisions of this Court declaring that appellate review of a grant of summary judgment must be on all the evidence in the record. *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2098, 2110 (2000). The obligation of the Court of Appeals to consider any competent evidence in the record does not impose upon that reviewing Court the duty to identify those facts for Petitioners. Rule 56(e) charges the non-movant with that responsibility. The District Court repeatedly ruled that Petitioners had failed to allege or submit any evidence in support of their claims.[2] It was Petitioners' obligation to identify to the Court of

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[2] For example, Petitioner Webb maintained that the Respondents had violated his Fourteenth Amendment right to due process by failing to grant him a raise. (Complaint, r. 1 at 11). The District Court ruled that Webb had failed to submit any evidence that he had anything more than a unilateral expectation of a raise, and that did not rise to the level of a property right. (Appendix, p. 32a). On appeal, Webb failed to identify any evidence submitted to the District Court that created a genuine issue that he had a clear entitlement to the raise. Thus, the District Judge granted summary judgment on that issue.

Appeals that evidence which they maintain was presented to the District Court but disregarded, but they failed to do so.

Under these circumstances, the form of review by the Court of Appeals comported with the prior decisions of this Court. Moreover, the detailed opinion of the District Court reveals that it carefully reviewed the voluminous evidentiary submittals and Petitioners' six days of evidence presented at the injunction hearing. The Court of Appeals in *Webb II* was satisfied that Judge Tinder had handled the issues correctly. (*Webb II*, Appendix at p. 2a). In the absence of specific identification by the Petitioners of those parts of the record they believed were misapprehended by the District Court, the Court of Appeals appropriately determined it did not need to order the record to try to find them.

The instant case presents no question of general importance. The record and opinions below merely reflect that Petitioners believed that if they alleged enough claims of a certain kind or character, they would be relieved of their burden under Rule 56(e). This does not warrant a review by this Court.

Petitioners also misstate the record and the effect of prior precedent by alleging, at page 14 of their Brief, that the Court of Appeals improperly relied on the facts from *Webb I*. The opinion in *Webb II* merely indicates that the Seventh Circuit found it unnecessary to repeat the detailed history of the "meltdown" of the Criminal Justice Department under Dr. Webb because it had previously recited those facts in *Webb I*. (See Appendix, pp. 111a-117a). The opinion in *Webb II* also observed that

Judge Tinder had provided a detailed history in his 87 page opinion granting summary judgment. (Appendix, p. 2a).

There is no suggestion in the opinions of the District Court or the Court of Appeals that findings made at the preliminary injunction hearing were used on summary judgment to dispose of Petitioners' claims. In fact, the District Court did not make detailed findings after the injunction hearing, and that was one of Petitioners' complaints in their first appeal in *Webb I*. (See Appendix, p. 114a). The opinion of the District Court granting summary judgment evidences that the District Judge paid close attention to the nature of Petitioners' claims and whether any of the evidence they identified in their several Statements of Genuine Issues was material to their claims. The Court of Appeals properly concluded that the District Court had determined the issues correctly.

**B. The District Court properly granted Summary Judgment to Respondents because Petitioners could not show any genuine issues of material fact**

The arguments at pp. 17-21 of Petitioners' Brief underscore the central theme of both *Webb I* and the District Court's January, 2000 opinion granting summary judgment: Petitioners have many complaints, but they completely failed to articulate facts that supported a cause of action under 42 U.S.C. § 1983 or Title VII. For example, Petitioners repeatedly made claims like Webb's assertion that his desire to teach certain courses was an "entitlement" rising to the level of a property interest, or

that his removal as Department Chairperson because he was insubordinate to the Dean violated his liberty interests. (Appendix, pp. 33-34a, 38a-39a). Petitioners failed to appreciate the elements of property or liberty interests under the Fourteenth Amendment, and failed to present evidence to the District Court demonstrating the existence of a genuine factual issue as to such claims.

Similarly, all the evidence before the District Court illustrated that Webb's complaints to the Board of Trustees and others were internal communications on matters of private concern to him in prosecuting his feud with the administration of the University. (Appendix, pp. 45a-50a). The District Court carefully considered the "speech" that Petitioners claimed was entitled to First Amendment protection and found that its content, form, and context compelled the conclusion that it was on matters of private concern. *Connick v. Myers*, 461 U.S. 138, 147-48 (1983); *Colburn v. Trustees of Indiana Univ.*, 975 F. 2d 581, 583-585 (7th Cir. 1992).

Petitioners' Title VII claims suffered from similar evidentiary deficiencies. Many of the claims were not preserved in administrative charges to the Equal Employment Opportunity Commission. (Appendix, pp. 61a-64a, 70a-72a, 78a-79a). *See, e.g. Cheek v. Western and Southern Life Ins. Co.*, 31 F. 3d 497, 500 (7th Cir. 1994). Others simply failed to allege any adverse action as a result of protected activity. (Appendix, pp. 67a-68a, 80a-81a). *Smart v. Ball State University*, 89 F. 3d 437, 441 (7th Cir. 1996); *Crady v. Liberty National Bank*, 993 F. 2d 132, 136 (7th Cir. 1993). The District Court properly granted summary judgment as to the remainder of the Title VII claims because Petitioners failed to offer any

evidence that suggested that Respondents' explanations for the employment actions at issue were pretextual. (Appendix, pp. 69a-70a, 75a-78a, 81a-82a). *Feldman v. American Memorial Life Ins. Co.*, 196 F. 3d 783, 793 (7th Cir. 1999). The District Court correctly found that multiple reasons existed to grant summary judgment on these claims and applied governing law in the Seventh Circuit accordingly.

Finally, Petitioners mix and confuse the District Court's ruling from the bench denying the preliminary injunction, and the detailed opinion issued two (2) years later granting summary judgment to the Respondents. (Petitioners' Brief at 21). At no point in the opinion granting summary judgment did the District Judge indicate he was adopting or relying upon his ruling denying preliminary relief. The Petitioners requested and were granted permission to augment their responses to the summary judgment motions by references to the transcript of the injunction hearing. (R. 146, 149). However, this was simply a submission of the type of evidence contemplated by Rule 56(e).

The District Court did properly note at the injunction hearing that Petitioners failed to offer any evidence that the actions about which they complained as violating their First Amendment rights were committed with a retaliatory motive. (R. 109 at 115, 284; 115 at 1404). This was a correct statement of the law. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Cromley v. Board of Educ.*, 17 F. 3d 1059, 1068 (7th Cir. 1994). The District Court's opinion granting summary judgment, however, did not reach the issue of whether or not there was evidence that Respondents' actions were motivated

by Petitioners' allegedly protected speech because Judge Tinder concluded the speech was on matters of private concern and thus not protected. (Appendix, pp. 43a-50a).

The Court of Appeals correctly affirmed the District Court because Petitioners failed on appeal to demonstrate any errors in the District Court's conclusions about the deficiencies in Petitioners' factual submissions. Nothing in this process deviated from established precedent in this Court or established principles of summary judgment. Accordingly, the Petition should be denied.

### C. The District Court properly denied Petitioners' untimely and unsupported motion to conduct further discovery

In the Seventh Circuit, the standard of review of a District Court's decision on a matter involving management of discovery is whether the Court abused its discretion. *Brill v. Lante Corp.*, 119 F. 3d 1266, 1275 (7th Cir. 1997). On appeal, Petitioners maintained their August 12, 1999 motion for leave to conduct additional discovery should have been construed as a motion for a continuance pursuant to Rule 56(f). A District Court's denial of a Rule 56(f) motion is also reviewed by an abuse of discretion standard. *Farmer v. Brennan*, 81 F. 3d 1444, 1449 (7th Cir. 1996). The Court of Appeals correctly ruled that the District Court's denial of Petitioners' August 12, 1999 motion was a proper exercise of its discretion.

Petitioners filed their complaint on August 4, 1997. The forty-eight (48) page complaint contained a recital of a course of events occurring over four (4) years and involving the governing Board of the University, most of

the administration, a number of faculty committees, and the majority of Petitioners' academic colleagues in the CJC Department. The scope of the action would suggest that Petitioners might have recognized the need to conduct discovery. However, they made no effort to take depositions or serve discovery requests until the August, 1999 motion.

Federal Rules of Civil Procedure 33, 34 and 36 impose no limitation upon when a party may conduct discovery. In the case at bar, over two and one-half months passed between the filing of the complaint and receipt by Petitioners of Respondents' dispositive motions. After receipt of those motions, Petitioners sought and received an enlargement of time until January 2, 1998 to file responses. (R. 78). Still, however, Petitioners did not conduct any discovery. Instead, they filed a motion for a preliminary injunction on December 12, 1997. (R. 80). Attached to this motion were thirty-four pages of affidavits from Petitioners. Petitioners then filed their responses to the summary judgment motions on December 29, 1997, attaching more affidavits; one from each Petitioner, consisting of thirty-seven (37) total pages.[3] From this pattern, it is apparent that Petitioners pursued a conscious strategy to oppose the summary judgment motions by submitting their own view of events instead of conducting discovery from the Respondents.

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[3] These submissions included affidavits from Dr. Susan Sayles, who was also a Plaintiff in the proceedings below. Before the Court of Appeals ruled in *Webb II*, Dr. Sayles dismissed her appeal.

Moreover, the Petitioners presented six (6) days of evidence at the injunction hearing in December, 1997 and January, 1998. This included examining as hostile witnesses their two principal adversaries – Dean Johnstone and Provost Vander Hill – in what the Court of Appeals described as the "warfare" that had raged in the CJC Department, causing it to "melt down". *Webb I.* (Appendix, p. 111a, 117a). It was during the course of this hearing that the District Judge reminded Petitioners' counsel that evidence of the motivation of these parties was critical to his determination. (R. 109 at 115, 284). After the District Court ruled on January 8, 1998 denying the application for injunctive relief, Petitioners again conducted no discovery and instead requested a stay of proceedings while the injunction ruling was on appeal. (R. 124).

The appeal in *Webb I* was disposed of and the mandate received in the District Court on March 18, 1999. Petitioners then took no action for five (5) months until they requested on August 14, 1999 that the District Court vacate the stay and permit them to conduct discovery or file more affidavits. (R. 147). That motion was unsupported by the affidavit required by Rule 56(f) explaining why more time was necessary to conduct the discovery.

When Petitioners filed their first response in December, 1997 to the pending motions, they requested, due to the burden of preparing for the injunction hearing, that they be granted additional time after the hearing within which to submit additional arguments and materials. (R. 87). However, in the text of this request Petitioners made no mention of any need to depose any University Respondent or serve any discovery requests, and it was

not presented as a Rule 56(f) motion. Instead, on January 22, 1998, Petitioners filed a Second Amendment Statement of Genuine Issues referencing their affidavits.

The record in this case reveals that before their August, 1999 motion the Petitioners had two significant periods of time in which to conduct discovery, but they failed to do so. Ample precedent in the Seventh Circuit holds that a party should not be rewarded for being dilatory in conducting discovery. *Grundstad v. Riff*, 166 F. 3d 867, 873 (7th Cir. 1999); *Jones v. Merchants Nat'l. Bank & Trust Co. of Indianapolis*, 42 F. 3d 1054, 1060 (7th Cir. 1994). When the District Court extended the filing date for their responses to the dispositive motions to late December, 1997 and then granted extra time until January 22, 1998 Petitioners were on notice that the District Court expected their responses to be complete by that time. Rule 56(e) plainly requires the non-movant to gather and submit that evidence which the party believes shows there is a genuine issue for trial. It does not suggest that the party may do it piecemeal or assume entitlement to more opportunities. If the evidence is unavailable, Rule 56(f) permits the party to seek a continuance, but Petitioners failed to do this and the District Judge was entitled to consider the submissions complete and commence work on an opinion.

The District Court correctly exercised its discretion and followed established precedent in denying Petitioners' August, 1999 motion for leave to conduct discovery. The motion was not only untimely, but it failed to include the affidavit required by Rule 56(f) detailing why the Petitioners had been unable to obtain the desired

evidence or how they believed a continuance would permit them to obtain it. (Appendix, p. 108a). Petitioners were aware that Rule 56(f) applied to their situation because they cited it in their August 12, 1999 motion. (R. 146 at 9). The brief of Petitioners in the Court of Appeals suffered from the same deficiency. (*Webb II*, Appendix, p. 2a). Under governing precedent in the Seventh Circuit, this omission was grounds to deny the request. *Williams v. National R.R. Passenger Corp.*, 161 F. 3d 1059, 1063 (7th Cir. 1998); *United States v. All Assets and Equipment of West Side Bldg. Corp*, 58 F. 3d 1181, 1190 (7th Cir. 1995).

Moreover, Petitioners were not prejudiced by the District Judge's ruling. As he pointed out in his opinion denying the request, the record then before him on summary judgment was voluminous. (Appendix, p. 108a). Petitioners were permitted to provide to the District Court citations to the record from the preliminary injunction hearing. (R. 149 at 2-3). This record contained 138 pages of testimony from Provost Vander Hill. (R. 109 at 145-283) and 101 pages from Dean Johnstone (R. 110 at 436-536). These University administrators were principal targets of Petitioners' complaints, and were called by Petitioners during the January, 1998 hearing as adverse witnesses. Because the injunction was requested to restrain what Petitioners claimed was ongoing retaliation, the District Judge repeatedly reminded counsel for Petitioners that unlawful intent, or a motivation to retaliate for protected conduct, was what they had to prove. (R. 109 at 115, 167-68, 277, 284; R. 110 at 402, 452). Some of those admonitions occurred during Provost Vander Hill's testimony. Thus, the Petitioners had an ample opportunity to explore the state of mind of the Respondents,

and were not prejudiced by the District Court's August, 1999 order denying further discovery.

Finally, Petitioners allege that the proceedings below are inconsistent with this Court's decision in *Crawford-El v. Britton*, 523 U.S. 574 (1998). Petitioners did not make this argument to the District Court when they moved for leave to conduct additional discovery over one year after the decision in *Crawford-El*. For this reason alone, this Court should deem the issue waived. *See Jenkins v. Anderson*, 447 U.S. 231, 234 (1980) (citing *Dorszynski v. U.S.*, 418 U.S. 424, 431, n.7 (1974)).

The claims in the case at bar were baseless and insubstantial, as the District Court's opinion granting summary judgment demonstrates. *Crawford-El* recognizes that limited discovery may not be appropriate in such cases. *Id.* at 593, 598. Discovery in such cases may merely be a tool to harass public officials. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In this regard, Respondents deem it important to note that the District Court did not grant summary judgment on Petitioners' § 1983 claims because of a failure to offer evidence of improper retaliatory motive. The judgment was based upon the determination of the District Judge that Petitioners had shown no facts evidencing a protectible property or liberty interest, and that the speech in issue was on matters of private concern. Therefore, even if the District Court had allowed limited discovery, it could not have changed the outcome on summary judgment.

The record below demonstrates that the District Court properly exercised its discretion to deny further discovery and that the Court of Appeals correctly applied

Circuit precedent to affirm that decision. Nothing in this course of events was contrary to established precedents of this Court or of the kind or character of action that requires the exercise of this Court's supervisory authority. The Petition should be denied.

## III. CONCLUSION

For the reasons stated above, Respondents respectfully request that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be denied.

Respectfully submitted,

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(3)

00-1205

No.

Supreme Court, U.S.
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In the

# Supreme Court of the United States

GARY L. WEBB and MELISSA L. WISNER,

*Petitioners,*

*v.*

BOARD of TRUSTEES of BALL STATE UNIVERSITY, et al.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## REPLY BRIEF FOR PETITIONERS

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## ARGUMENT

### A. Respondents do not contest Petitioners' assertion that the Court of Appeals failed to conduct a *de novo* examination of the record.

In their Brief in Opposition, Respondents do not challenge Petitioners' claim in their Petition for Certiorari (Pet. 10-16) that the record clearly establishes that the Court of Appeals failed to conduct the requisite *de novo* review of the record in this cause.[1] They merely argue that the Court of Appeals "did not need to order the record." (Br. Opp. 15), because there was no "specific indication by the Petitioners of those parts of the record they believed were misapprehended by the District Court" (Br. Opp. 15),[2] but cite no authority establishing an exception to the rule requiring *de novo* review of the record in appeals from summary judgments. See *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1985) (*de novo* review requires review of the record taken as a whole); *Haefling v. United Parcel Service*, 169 F. 3d 494, 497 (7th Cir. 1999) ("We review the

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[1]R. 175 is the mandate and the accompanying cover letter indicating no record was being returned because none was sent. Petitioners timely filed their Designation of Record on appeal pursuant to local Rule 76.1. (R. 165). Circuit Rule 11(a) provides in relevant part that records from all District Courts except those in the Northern District, Eastern Division, "are to be temporarily retained by the district court clerk's office pursuant to Rule 11(c). . . After the appeal is ready for scheduling for oral argument or submission, *the clerk of the court of appeals will notify the district court clerk to transmit the record to the court of appeals*." (Emphasis added). The record shows no such notification was received by the District Court clerk.

[2]This Court can determine for itself whether the number and quality of the issues raised in both Petitioners' papers filed in the District Court in opposition to Respondents' dispositive motions (e.g., R. 150, R. 87, 195, 197, 108) and their brief on appeal below were sufficient to raise genuine issues of material fact. The issue before this Court, however, is whether the Court of Appeals conducted a proper *de novo* review of the record, not whether this Court should deny the Writ of Certiorari because the Court of Appeals may have guessed correctly (without examining the record) that the District Court properly granted summary judgment for Respondents.

district court's grant of summary judgment *de novo*, drawing our own conclusions of law and fact *from the record before us*") (emphasis added); *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991) (where *de novo* review is compelled, no form of appellate deference is acceptable); *Tobey v. Extel/JWP., Inc.*, 985 F. 2d 330, 332 (7th Cir. 1993) (*de novo* review in summary judgment is conducted "without deference for the view of the district Judge and hence almost as if the motion had been made to us directly"). These principles were honored in the breach in this case. What makes the Court of Appeals' failure to conduct any examination of the record even more egregious is not only its flagrant disregard of this Court's precedents, but the fact that it claimed to have "the briefs *and the record*" (emphasis added), (App. 1a), and its failure to in fact do so was done in the context of a case in which Petitioners had specifically argued that the District Court in its opinion had *itself* (a) disregarded six days of live testimony, (b) had struck portions of affidavits on certain grounds that would have been admissible on other grounds, (c) had disregarded a 13-page affidavit to which no objections had even been filed, (Pet. 8-9, 25-26), and (d) had struck certain statements of genuine issues as conclusory, where they contained specific references to the record reciting the adverse actions taken by Respondents against Petitioners. (Pet. 26, n. 12). Thus, the Court of Appeals' failure to examine the record in this case compounded the injustice of the District Court's own failure to take cognizance of all the evidence in the record. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). Nor do Respondents address the significant policy implications (Pet. 16) of permitting Courts of Appeals in our judicial system to dispense with an examination of the record, i.e., the denial of litigants' Seventh Amendment right to trial by jury. This Court should ensure, through the exercise of its supervisory power, that the Seventh Circuit and every other Court of Appeals provide Petitioners, and all other appellants and appellees, a full and fair opportunity to have their appeals from a grant of summary judgment considered by an actual review of the record. Courts of Appeals cannot be permitted to act as a rubber stamp or "judicial echo" of District Courts. The "summary judgment of a summary

judgment" that took place here is not what the framers of the Constitution contemplated when they adopted the Seventh Amendment, nor what Congress or this Court contemplated when Rule 56 of the Federal Rules of Civil Procedure was adopted for civil litigation. This is what justifies this Court's exercise of its supervisory power in this case.

**B Correction of Respondents' statement of facts reveals the inferences from the evidence favorable to Petitioners to which they were entitled, but which they were denied.**

Petitioners seek a Writ of Certiorari to vacate the opinion of the Court of Appeals and remand this case to that court with instructions that it conduct an actual *de novo* examination of the record in this cause. Therefore, a review of all the facts of this case is unnecessary, which is why Petitioners' merely described them with a broad brush in their Petition for Certiorari. (Pet. 2-4). However, Respondents' chose in their Brief in Opposition to provide a detailed yet incomplete and inaccurate account of the facts. For example, Respondents' description of Webb's April, 1994, report of a sexual harassment complaint of a student against Dr. Meagher and the University's handling of it by his former girlfriend and assistant vice-provost Wynola Richards (Br. Opp. 1-3) implies Webb was unreasonably insisting on Meagher's immediate termination. Respondents fail to mention that Webb had, eight months earlier (September, 1993), passed on to Richards the first complaint against the same professor (Meagher). (R. 111, 723-725). After Webb and Richards' breakup in late 1993, (R. 111, 726), Respondents Johnstone and Vander Hill, took a series of adverse administrative actions against his department. ((R. 111, 727, 730). Richards then refused to act on Webb's second student sexual harassment report received regarding Meagher in April, 1994, stating in a memorandum to Webb that the complaint, alleging Meagher's requests for fellatio in his office, was in her view and that of legal counsel (Respondent Moll) not sexual harassment. (R. 111, 734-735). After Webb met with her, she took back the memorandum,

and referred the complaint to the AF & E (Academic Freedom & Ethics) Committee. (R. 111, 735). As to Webb's purported refusal to appear before the AF & E Committee in his own defenseon Cotlar complaint, Respondents fail to note that his complaint was made on the heels of Webb's report (made with the support of the entire faculty) of Cotlar's misconduct, which included his refusal to teach an assigned course. (R. 111, 744-745).[3] Webb had Bell's Palsy (making speaking difficult) when the AF & E Committee meeting was scheduled. His request for a continuance due to his condition was ignored, and the committee conducted its hearing – and rendered its adverse decision – without him. (R. 111, 758).[4] Contrary to Respondents' claim that Webb's communications regarding the misconduct he observed at the University were purely internal (Br. Opp. 17), he testified that he communicated to various external governmental officials, (R. 113, 914-915), not to mention having filed his EEOC complaints. (R. 1, Exhibits 1-3). Respondents' description of the members of the Ad Hoc Committee established by the Board of Trustees and the president (Respondent Worthen) to consider Webb's June, 1995, complaint as "distinguished tenured faculty" (Br. Opp. 6) is belied by the testimony of former defendant Richards, who testified that it was "common knowledge" (R. 113, 829) in administrative circles that this committee was established as Webb's "firing squad." (R. 113, 829, 836-837). The committee consisted of administration loyalists, i.e., faculty who, according to Richards, are placed on committees by administrators, know how they want them to vote, and who vote that way. (R. 113, 844). She admitted having lied herself to an AF & E Committee about her affair with Respondent Vander Hill, at his urging. (R. 113, 849). In fall, 1996, Webb's department colleagues (except Sayles) joined the loyalist camp by conducting a "relentless

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[3]Instead of taking remedial action, Respondent Johnstone, over Webb's and the entire faculty's objection, permitted Cotlar to be paid for teaching the assigned course, but said that he didn't have to teach it. (R. 111, 745-757).

[4]The undisputed testimony, supported by a transcript of a telephone conversation between Webb and Airries, was that Airries, admitted to Webb that he was "just a soldier in the army here. And I'm just doing what's asked of me." (Respondents' Exhibit 85, transcript of January 18, 1995, at 4).

campaign"[5] of harassment against him and other reporters of sexual harassment and discrimination in the department, i.e., Petitioner Wisner and former plaintiff Sayles, to further their own personal and financial interests.[6] Respondents' brief mentions Dean Johnstone's receipt of a memorandum dated November 4, 1996, from six departmental faculty requesting that the dean remove Webb as chairperson. (Br. Opp. 7). Respondents conveniently omit the fact that this was a secret 6-page memorandum requesting that Webb be removed as chair, that Sayles be removed as assistant chair, and that Wisner be removed as administrative coordinator, to which Petitioners had no opportunity to respond. (R. 113, 927). That memorandum was followed immediately by three others from Respondents Hendricks, Ho, and Byers to Johnstone alleging misconduct on the part of Petitioners, to which they were also never given an opportunity to respond. (R. 63, Exhibit 2-P). These secret memoranda were used by Johnstone as the basis of his February 17, 1997, letter to Respondent Vander Hill asking for Webb's removal as chairperson. (R. 63, Exhibit 2-U). Johnstone admitted under oath that he never contacted Webb to ascertain the truth of these memoranda (R. 110, 488), and that he never took any action in response to Petitioners' allegations complaining of sexual harassment and retaliation by certain Respondent faculty

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[5]See *Knox v. State of Indiana*, 93 F. 3d 1327, 1335 (7th Cir. 1996), where such a campaign was found actionable.

[6]Aside from Webb's March, 1997, removal as department chairperson and the plastering of his personnel file with a barrage of memoranda containing false and defamatory accusations (R. 113, 1002), the most blatant adverse actions were, and continue to be (a) Respondents Hendricks' contravention of the established entitlement of tenured Ball State University faculty to teach in their areas of specialization, as established by the uncontraverted testimony of four present or former department chairs (R. 109, 314, 318-319, 328-329, 336-341, 352, 356-357, 362, 364, 366, 370, 374-375, 381-383, 385-386, 399, 403-404) and Respondent Provost Vander Hill himself (R. 109, 244-246), and (b) unjustifiably poor performance evaluations by Respondents Hendricks and Brown that resulted in denial to Webb of any raises (allowing his colleagues to split monies that would otherwise have been used for his raises), summer teaching assignments, and compensation for teaching correspondence courses. (R. 132, 133).

members. (R. 110, 481-484). The District Court and the Court of Appeals, in accepting *in toto* Respondents theory of the case, i.e., that Petitioners had caused a "meltdown" of the department, usurped the role of the jury by making credibility judgments and weighing the evidence. The aforementioned secret "concerned faculty" letter of November 4, 1996 (R. 64, found between Exhibits 6F and 6G) to Johnstone asking for Petitioners' removal came three days after former plaintiff Sayles' November 1, 1996, complaint of sexual and non-sexual harassment by Respondent Hendricks and Ho. Four days later these faculty and two other Respondents also filed false and secret countercharges against her and both Petitioners with the university affirmative action office. (R. 64, Exhibits 6D, 6E, 6G, 6H). Respondents' contention that Petitioners never availed themselves of the opportunity to respond to those (counter)complaints (Br. Opp. 7) omits evidence establishing that Petitioners refused to appear at the affirmative action office until they were first informed of the specific charges against them, and were given the procedures to be followed in such matters, neither of which did the affirmative action officer, Respondent Sali Falling, provide them. (R. 113, 948-952; R. 114, 1155-1159). Respondents' assertion that Webb had not cooperated with Respondent Johnstone's July, 1997, directive "to ensure an orderly transition" of chairpersons (Br. Opp. 8) omits the fact that the directive in question was one requiring that Webb cancel a summer, 1997, course schedule that he had previously submitted to – and which was approved by – Johnstone, and that Johnstone wanted it changed in violation of university regulations to accommodate a belated request for certain coveted course assignments (i.e., supervising student internships) sought by Respondents Hendricks and Byers.[7] Three days after the state

[7]Webb testified these loyalist faculty had never been promised these internship assignments, that he never saw their memoranda to Johnstone complaining about his handling of this issue, and that it was his prerogative as chairperson under university regulations to make teaching assignments as he saw fit (R. 113, 956-976; R. 114, 1058-1069). A state court judge agreed and granted him a temporary restraining order on February 14, 1997, against Dean Johnstone and other university administrators, prohibiting them from changing the summer schedule and engaging in any retaliation against him (and Sayles). (R. 113, 978-979). Respondents immediately violated the TRO and posted a new

court on February 14, 1997, granted a TRO in Webb's favor regarding the summer schedule dispute, defamatory letters were received by the Muncie and university newspapers falsely accusing Webb of a sex-for-grades scandal, which they investigated and found groundless. (R. 113, 980). Webb identified the handwriting on one of the envelopes as Respondent Hendricks'. (R. 113, 989). The day after Webb filed his second EEOC complaint on March 10, 1997, a friend and popular adjunct faculty member (Dave Morris) was told by Hendricks that his contract would not be renewed because of his relationship with Webb. (R. 109, 130-135). Immediately thereafter, according to student Ryan Loy's testimony, Respondent (part-time instructor) Jean Comley, another loyalist, learned Loy was circulating a petition opposing Morris' firing. She thereupon threatened Loy by telling him that to do so would not be in his best interest, so he stopped collecting student signatures on the petition. (R. 109, 117). Thirty days after filing of the Complaint in August, 1997, and to date, Respondent Hendricks, as the new chairperson, assigned Webb to teach three courses outside his areas of specialization without any stated *or* pretextual justification. (R. 113, 1008-1009). Petitioners, as nonmoving parties in summary judgment, were entitled to – but did not receive – the reasonable inferences in their favor that can be drawn from all of the foregoing evidence. *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990).

### C. Respondent state officials, protected from discovery by *Harlow v. Fitzgerald*, are estopped from attributing delay in discovery to parties complying with the rule in that case.

Why would Petitioners (or any other litigant), as

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course schedule that accommodated Hendricks and Byers, thereby disrupting the normal process of student class scheduling. (R. 112, 987; R. 113, 1074). Webb filed his second EEOC complaint on February 26, 1997 (R. 112, 990), and seven days later, on March 5, 1997, he received his notice of removal as chairperson of the department. (R. 113, 991). On the same day as his removal, Wisner was transferred to another position in another unit, with significantly different responsibilities. (R. 114, 1186-1188).

Respondents argue, pursue "a conscious strategy to oppose summary judgment motions by submitting their own view of events instead of conducting discovery from Respondents" (Br. Opp. 20) if discovery was available? The simple answer is that discovery was not available; Respondents, as governmental officials, were beneficiaries of the prohibition upon discovery before a court ruling on their qualified immunity defense as this Court declared in *Harlow v. Fitzgerald.* 457 U.S. 800 (1982). Had Petitioners initiated discovery immediately upon filing suit, Respondents would most assuredly have sought immediate sanctions or a protective order. Thus, Respondents are estopped from, on the one hand, benefitting from the *Harlow* prohibition upon discovery, and, on the other hand, asserting that compliance with *Harlow* constitutes delay in conducting discovery that is attributable to Petitioners.[8] Their claim that Petitioners had ample opportunity to conduct discovery during the first 2 ½ months after

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[8]The District Court's also suggested Petitioners' should have violated *Harlow* (as it was interpreted before *Crawford-El*) and conducted discovery in the months after filing the Complaint and before Respondents even filed their first pleadings. (App. 107a-108a). Petitioners did not have the "sufficient discovery" that the parties had in *Williams v. National R.R. Passenger Corp.*, 167 F. 3d 1059, 1063 (7th Cir. 1998), cited by Respondents, nor did they fail to review documents that had been made available in the discovery process after being given extra time to do so, as in the second case Respondents cite on the Rule 56(f) issue. *United States v. All Assets, etc.*, 58 F. 3d 1181, 1190 (7th Cir. 1995). Petitioners never had *any* discovery because they were complying with the dictates of *Harlow v. Fitzgerald.* Respondents' cases in support of their contention that the request for limited discovery under *Crawford-El v. Britton*, 523 U.S. 574 (1998), was waived because that case was not cited in Petitioners' Rule 56(f) motion (i.e., *Jenkins v. Anderson*, 447 U.S. 231, 234 (1980) and *Dorszynski v. U.S.*, 418 U.S. 424 (1974)) are inapposite. (Petitioners did cite other lower court authorities in support of their Rule 56(f) request (Pet. 7 n. 4)). The facts in Respondents cases (a) arise in the habeas corpus context, which is governed by strict rules regarding prisoners' obligations to first raise constitutional issues in their state trial court, which is not the context here, and (b) rest upon an interpretation of *Wainright v. Sykes*, 433 U.S. 72 (1977), another habeas case. *Jenkins* in fact supports Petitioner's case by holding that a claim of waiver can *itself* be waived, which happened here; Respondents failed to file any objection to Petitioners Motion to Lift Stay and for Other Relief (R. 147), in which Petitioners made their Rule 56(f) request).

filing of their Complaint before responsive pleadings were filed is equally fanciful. (Br. Opp. 20). Petitioners granted Respondents the professional courtesy of not objecting to an enlargement of time within which to plead, and Respondents took advantage of that courtesy and did not file their dispositive motions until October 15, 1997 (R. 59-64) and October 29, 1997. (R. 72-75). It is disingenuous for Respondents to now suggest that Petitioners should have engaged in discovery while awaiting Respondents' first pleadings, where is common practice to await receipt of responsive pleadings before conducting any discovery.

### D. Respondents do not contest Petitioners' claim that in this case strict enforcement of the District Court's Local Rule 56.1 governing summary judgment practice violates Fed. R. Civ. P. 83(A)(2).

Respondents do not contest Petitioners' claim that strict enforcement of the District Court's local summary judgment Rule 56.1, under the facts of this case, "cause[d] a party to lose rights because of a nonwillful failure to comply with the requirement," in violation of Fed. R. Civ. P. 83(a)(2).[9] Petitioners agree that District Courts should not have to scour the record to find genuine issues of fact. But this principle assumes the court will have to wade through numerous unfamiliar depositions and other discovery material. Here, however, there was no discovery, the District Court heard six days of testimony, took notes during the hearing, was provided a time line and exhibit list by Petitioners with which to follow that testimony, heard witnesses identify and describe the significance of most of the documents the parties introduced into evidence, and then wrote an 87-page opinion about the case. To mandate perfect crafting of statements of

[9]The example given was the statement in Petitioners' Third Amended Statement of Genuine Issues which stated: "Whether plaintiff Webb and those who supported his opposition to misconduct, nonfeasance, and sexual harassment of students (i.e., plaintiffs Sayles and Wisner) were retaliated against by the defendants." (R. 150, ¶ 4). It was stricken as "overly broad, general, and conclusory," (App. 28a), but it was supported by numerous references to the record evidencing adverse actions taken against Petitioners.

genuine issues per a local rule, and ignore specific references to the record in support of such statements in the context of a case in which the court was intimately familiar with the facts is to raise form over substance, returns us to an era of common law pleading, denies Petitioners' and other similarly situated litigants' right to trial by jury, and is another departure from accepted and usual judicial proceedings in the summary judgment context, requiring this Court's exercise of its supervisory power.

## Conclusion

For the foregoing reasons, Respondents' arguments should be rejected, and the Writ of Certiorari should be granted to vacate the decision below and remand the case for a proper *de novo* examination of the record.

Respectfully submitted,
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